

THESIS TITLE

FORMATION OF A COMPANY

*WHAT UGANDA COULD LEARN FROM SOUTH AFRICA'S
MODIFIED SYSTEM*



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DEDICATION

To my Mother & Soogi, for everything.

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PLAGIARISM DEDICATION

Research dissertation presented for the approval of senate in fulfilment of part of the requirements for the degree of Master of Laws (commercial law) in approved courses and a minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations.

Sharon Nambasa

Date

ABBREVIATIONS & ACRONYMS

| | |
|---------|---|
| AOA | Articles of Association |
| B2B | Business to Business program |
| CIPC | Companies and Intellectual Property Commission |
| CIPRO | Companies and Intellectual Property Registration Office |
| CJRP | Commercial Justice Sector Program |
| CLRP | Commercial Law Reform Project |
| CMA | Capital Markets Authority |
| COMESA | Common Market for Eastern and Southern Africa |
| EAC | East African Community |
| FIAS | Foreign Investment Advisory Service |
| FY | Fiscal Years |
| GDP | Gross Domestic Product |
| GG | Government Gazette |
| GOU | Government of Uganda |
| HURIPEC | Human Rights and Peace Centre |
| IFRS | International Financial Recording Standards |
| IPO | Initial Public Offering |
| JLOS | Justice Law and Order Sector |
| JSE | Johannesburg Stock Exchange |
| KCCA | Kampala Capital City Authority |
| MOA | Memorandum of Incorporation |

| | |
|---------|---|
| MOI | Memorandum of Incorporation |
| MSMEs | Micro, Small and Medium Enterprises |
| NOI | Notice of Incorporation |
| NPC | Non-Profit Company |
| NRM | National Resistance Movement |
| OCIPE | Office of Companies and Intellectual Property Enforcement |
| P.A.Y.E | Pay As You Earn |
| PSFU | Private Sector Foundation Uganda |
| PTA | Preferential Trade Area |
| RDP | Rehabilitation and Development Plan |
| SI | Statutory Instrument |
| SME | Small and Medium Enterprises |
| UCB | Uganda Commercial Bank |
| UGX | Uganda Shillings |
| UIA | Uganda Investment Authority |
| ULRC | Uganda Law Reform Commission |
| UNFPA | United Nations Fund for Population Activities |
| URA | Uganda Revenue Authority |
| URSB | Uganda Registration Services Bureau |
| USE | Uganda Stock Exchange |
| VAT | Value Added Tax |

ABSTRACT

Formation of a company is an important aspect of the economy as well as socio-economic development whose process must be made accessible to all entrepreneurs because of its far-reaching consequences. This study examines the position of the process of company formation in Uganda as enshrined in the Companies Act 1 of 2012 as well as the requirements of other requisite legislation. The study further, discusses the obstacles of company formation as well as the resultant impact of a widespread informal sector in Uganda. The study concludes by using South Africa as a case study on how Uganda could improve on its process of company formation. Consequently, making it simpler and more adoptable to the entrepreneurial population to enhance and foster economic development.

CHAPTER ONE

INTRODUCTION

1.1 Overview of study

The formation of a company is a significant aspect of economic development that is often disregarded by researchers, authors, scholars and by various economies in the African region. ‘The formation of a company relates to a process where a company is brought into existence by an individual or by a group of individuals with the objective to form an association that will exploit business opportunities and where men, material, money and management are brought together or coincide.’¹ The product of this is a company, from an old French term ‘*compagnie*’ which connote a sense of ‘business association’; the term was also used in reference to trade guilds.²

Traditionally, three theories have been used to explain the meaning of the term company.³ These theories are the concession or fiction theory, the aggregate theory or contractual model theory and the natural entity or corporate realist theory.⁴ The concession⁵ or fiction⁶ theory conceives of a company as an artificial entity created and supervised by the state.⁷ Thus under this theory, incorporation is seen as a privilege. The aggregate theory or contractual model theory proceeds upon the basis that a company is a contractual creation comprised of contractual relations between the various people involved in the formation of the company.⁸ The aggregate theory has

¹ P Niteen ‘Formation of Companies’ available at <http://www.slideshare.net/Nitin6992/formation-of-companies>, accessed on 28 July 2014.

² D Harper & D McCormack ‘Online Etymology Dictionary’ available at http://www.etymonline.com/index.php?allowed_in_frame=0&search=company&searchmode=none, accessed on 28 July 2014.

³ F Macmillan Patfield ‘Challenges for Company Law’ in F Macmillan Patfield *Perspectives on Company Law* (2003).

⁴ Ibid.

⁵ See S Bottomley ‘Taking Corporations Seriously: Some Considerations for Corporate Regulation’ (1990) 19 *Federal Law Review* 203 at 206-208.

⁶ See M Stokes ‘Company Law and the Legal theory’ in W Twining (ed) *Legal Theory and the Common Law* (1986) 155 & 162.

⁷ For variations on the Concessions/Fiction theory, see W W Bratton ‘The New Economic Theory of the Firm: Critical Perspectives from History’ (1989) 41 *Stanford Law Review* 1471 at 1475.

⁸ See Bottomley op cit note 5 at 208-211. Also see Stokes op cit note 6 at 155 & 162.

been developed by economists into the nexus-of contracts theory of the firm.⁹ The last theory which is the; natural entity or corporate realist theory argues that by acting together those who have formed a company create an entity separate from themselves.¹⁰ We can deduce from the three theories that have been discussed above that the point of departure between corporate realists and those who adhere to the concession theory is that the former regard the new body as being naturally formed and not dependent on state intervention while the latter regard the newly formed company as a creature of contractual agreement.¹¹ The concession or fiction theory conceives of a company as an artificial entity created and supervised by the state.¹² Thus, under this theory, incorporation is seen as a privilege.¹³ This assertion will be discussed in detail in this study.

This paper will study the process of forming a company in Uganda. The process has often been described by entrepreneurs, researchers, scholars and others as slow, too bureaucratic, complicated, and full of legal hurdles that may require legal assistance to overcome.¹⁴ The time consuming nature of forming a company in Uganda has discouraged domestic and international investors from establishing companies.¹⁵ For example, it may take up to 33 days to establish a simple sole proprietorship.¹⁶ These delays have the effect of slowing growth in the commercial sector. However, additional reasons have been advanced for the slow pace of setting up companies in Uganda. These include dated inefficient legislation¹⁷ and policies, poverty, high

⁹ Bratton op cit note 7 at 407.

¹⁰ Stokes op cit note 6 at 162-163. Also see Bottomley op cit note 5 at 211-213.

¹¹ For an attack on the theory that the company is naturally separate from its shareholders, see P Ireland, I Grigg-Spall & Kelly D 'The Conceptual Foundations of Modern Company Law' in P Fitzpatrick & A Hunt (eds) *Critical Legal Studies* (1987) 149.

¹² See Bottomley op cit note 5 at 206-208. Also see Stokes op cit note 6 155 & 162. For variations on the Concessions/Fiction theory, see Bratton op cit note 7 at 1475.

¹³ Ibid.

¹⁴ World Bank 'Economic Overview Uganda' available at <http://www.worldbank.org/en/country/uganda/overview#1>, accessed on 19 August 2014.

¹⁵ Bureau of Economic and Business Affairs '2013 investment Climate Statement – Uganda' available at, <http://www.state.gov/e/eb/rls/othr/ics/2013/204753.htm>, accessed on 8 August 2014.

¹⁶ Healy Consultants 'Uganda Company registration' available at <http://www.healyconsultants.com/africa-incorporation/uganda-company-registration/>, accessed on 1 Aug 2014

¹⁷ The primary reason for the departure from the old Companies Act (1961) Cap 110 was due to its foundations in the United Kingdom Legislation- the Companies Act (1948) which was removed as unsuitable for the English economy several years ago. Moreover, this piece of legislation had been overhauled in the United Kingdom on numerous occasions in order to keep abreast of the changes in that society. For 53 years even longer than the time it has been independent, Uganda adhered to the same piece of company legislation devoid of major amendments and out of touch with the changed needs of its society until July 2013 when the new Companies Act came into force. Despite its enactment into law; it has been referred to as inadequate with minimal departure from the 1948 English

levels of illiteracy, the inefficiencies of a centralised administration for registering companies, corruption, and political instability, amongst others.

To address some of these problems, in 2004, the Uganda Law Reform Commission (ULRC) embarked on a process of reforming laws that regulated commerce. This led to the enactment of the Companies Act 1 of 2012, which repealed the Companies Act of 1961, and provided for the incorporation and administration of companies in Uganda. It came into force in July 2013. Long overdue, the Companies Act was a progressive step towards aligning the Ugandan company law with global trends in the area of incorporating and governing companies.¹⁸ The new Act makes general provisions regarding the process of company formation. Unlike the repealed Act, the new Act did not provide any regulations that offered specific rules and procedure regarding company formation. Consequently, the regulations of the repealed law have been utilised in processes to incorporate companies.¹⁹ This exhibits stagnation and an inadequate development in Uganda's legal regime.²⁰ Further, this omission of the regulations in the new Act should have been addressed at the preliminary stages of the law making process before it was taken into parliament for debate as the Companies Bill,²¹ and before it was passed into law. With such discrepancies in the new law; it is little wonder that the process of formation of a company has failed to be adopted by majority of the entrepreneurial population in Uganda.

From a structural perspective; in 2011, the Uganda Registration Services Bureau (URSB) was granted the autonomy to deal with the process of company registration in Uganda. This was viewed as a progressive decision towards the efficient facilitation of the process. However, the

legislation thus requires further review especially the provisions that regulate the process of formation of a company. See D J Bakibinga *Company Law in Uganda* (2001) 3.

¹⁸ C Nyombi 'Commercial Law in Uganda: Where are we now?' *New Vision* 07 August 2014.

¹⁹ The Companies Act Cap 110, Laws of Uganda 2000 (Old Companies Act); Further Section 12 of the Interpretation Act Cap 3, Laws of Uganda 2000 provides for the effect of repeal on statutory instruments. It states that where any Act or part of an Act is repealed and reenacted, with or without modification, statutory instruments made under it shall, unless a contrary intention appears, remain in force, so far as they are not inconsistent with the repealing Act, until they have been revoked or repealed by statutory instruments made under the repealing Act, and until that revocation or repeal, shall be deemed to have been made under the repealing Act. This may be used to justify the use of the regulations in the old Companies Act.

²⁰ For more details on the subject matter see S Atim 'Changes in the Uganda's Companies Act: Act 1 of 2012 vis avis CAP 110' available at http://sheillokeny.blogspot.com/2013/11/normal-0-false-false-false-en-us-x-none_11.html, accessed on 20 July 2014.

²¹ The Companies Bill No. 14 of 2009.

URSB still uses cumbersome and lengthy manual registration processes which have in turn discouraged many Ugandans as well as foreign investors from registering their companies.²² Thus, majority of companies in Uganda are established and operated informally which in turn limits the development of the commercial sector as well as the economy. This informal operation of companies also inadequately equips statisticians with the necessary information to determine the possibly significant contribution of these businesses to the country's GDP.²³ Additionally, Uganda's incorporation policy towards foreign companies is highly undesirable.²⁴ To illustrate, the Heritage Foundation's 2014 Index on Economic Freedom ranked Uganda's economy 91st out of 178 countries, as one of the countries with the most restrictive regulations to form foreign companies.²⁵ However, foreign companies have been known to highly contribute to the development of several economies for example South Africa.²⁶ The absence of a flexible regulation to form foreign companies in Uganda places it at a disadvantage which requires immediate attention from all concerned stakeholders.

In conclusion, over the centuries companies have played a crucial role in the economic development of countries and as such, the process of company formation is an aspect of economic development that no country should overlook. Uganda aspires to and has a mandate attain socio-economic transformation from a peasant economy to a modern and prosperous economy with in 30years.²⁷ Since company formation is crucial to socio-economic transformation, it is essential to ascertain how the lack of an efficient process could affect Uganda's future aspirations of creating a modern economy. Thus, the task ahead for the government of Uganda will be to improve on this process and this can be done by making reference and drawing lessons on the approach and strategy adopted by other developing African

²² A Busiki & Co. Advocates 'The legal requirements for formation and operation of a company in Uganda' available at, www.hg.org/article.asp?id=28691, accessed on 20th July 2014.

²³ Government of Uganda Report on the Business Register, 2002/2002 Kampala: Uganda Bureau of Statistics.

²⁴ Bureau of Economic and Business Affairs '2012 Investment Climate Statement-Uganda' June 2012, available at, <http://www.state.gov/e/eb/rls/othr/ics/2012/191256.htm>, accessed on 1 August 2014.

²⁵ The statistics are available at www.heritage.org/index/ranking, accessed on 5 Aug 2015.

²⁶ The World Bank *Doing Business Report 2014* available at <https://openknowledge.worldbank.org/bitstream/handle/10986/16204/19984.pdf?sequence=1> accessed on 28 July 2014.

²⁷ The National Planning Authority 'Uganda Vision 2040' at (iii) available at <http://npa.ug/wp-content/themes/npatheme/document/vision2014.pdf>, assessed on 19 January 2014.

countries like South Africa. Although some have authors have argued that compared to recent legislative initiatives in some jurisdictions, the reform of South African company law has not been as comprehensive as a few commentators may wish.²⁸ It should be kept in mind that of all industrialised countries with a British derivative company law system, South Africa was the first to take a step forward in providing legal means and expectations of a typical modern process of company formation.²⁹ Furthermore, as the only African country member of the G20 countries³⁰, globally South Africa stands at 64 in the ranking of 189 economies on the ease of starting a business.³¹ On the other hand, Uganda stands at 132 of 189 economies on the ease of starting a local business.³² This research will also critically analyze and discuss South Africa's legislation and policies, structures inter alia regarding the process of company formation highlighting the positive aspects to make suitable recommendations to Uganda on how to improve on process of formation of a company.

1.2 Research questions

The core question of this dissertation is; 'what can Uganda learn and emulate from South Africa's modified process of company formation?'

The subsidiary questions are;

1. With the coming into force of the new Companies Act³³; what is the current position of company formation in Uganda?
2. Is this position adequate for Uganda's development objectives?
3. What are the peculiar features of the South African process of company formation that make it desirable for Uganda to emulate?

²⁸ See Du Plessis, "*Some International Developments in Company Law: A South African Perspective*" (1993) 14 The Company Lawyer 224.

²⁹ Patfield op cit note 3 at 164.

³⁰ Available at www.g20.org/about_g20/g20_members, accessed on 5 Aug 2014.

³¹ The World Bank 'Doing Business Report 2014, Economy profile: South Africa' at 16 available at, <http://www.doingbusiness.org/data/exploreeconomies/southafrica/~media/giawb/doing%20business/documents/profiles/country/ZAF.pdf>, accessed on 5 Aug 2014.

³² The World Bank Doing Business Report 2014, Economy Profile: Uganda, available at <http://www.doingbusiness.org/data/exploreeconomies/uganda>, accessed on 5 August 2014.

³³ The Companies Act No.1 of 2012.

1.3 Statement of the problem

The process of company formation is a contentious issue that is bound to generate controversy among the local population, government and foreign investors. The situation in Uganda is not dissimilar.³⁴ Although strides have been made to legislate and regulate company formation over the years,³⁵ further business development could be made if the necessary amendments were made to the relevant legislation and policies. This study appraises Uganda's process of company formation while drawing lessons from the South African process of company formation and how it accommodates all stakeholders by addressing the pertinent issues of policy, compliance and amendment of the relevant legislation. The study further contributes to the ongoing debate in Uganda about the rigid legislation and policies on the formation process.

1.4 Justification of Study

Uganda as a third world country has a lot to learn from its counterparts especially in the African region on the process of company formation.³⁶ Thus, the need for Uganda to boost and develop its commercial sector, especially in relation to the process of company formation justifies this study. It is therefore desirable for Uganda to learn from the experiences of other developing African countries to adopt the good practices and policies which have fostered company formation. Furthermore, this study is embarked on with the broad aim of establishing Uganda's position on the process of company formation; assessing its credibility in light of the government's intended objectives and in view of the country's national, regional and international business-related policies and legislation and will highlight the possible underlying interests in an accessibly made process of formation of a company.

By providing a comprehensive analysis on the formation process from a legal, social and economic perspective; this study will attempt to form a basis upon which the future process of company formation in Uganda could be improved through highlighting the obstacles of the current position and subsequently suggesting areas for further review. Currently, there is wide concern regarding the extent to which the existing legislation can promote company formation.

³⁴ World Bank 'Economic Overview Uganda' op cit note 14.

³⁵ Uganda Law Reform Commission: Study Report on Company Law, 2004.

³⁶ Countries of the third world available at www.nationsonline.org/oneworld/third_world.htm accessed on 1 August 2014.

The laws are rigid and this has led to discontentment among the entrepreneurial population in Uganda. So how best can this discontentment be resolved? This paper seeks to address all these issues. Thus, with an improved process of company formation, Uganda will be able to enjoy economic, social and political benefits that come with a developed commercial sector as well as improve its ranking in the World Bank's *Doing Business Report*.³⁷ To illustrate, this report ranked South Africa at 41 and Uganda at 132 of 189 economies with a favorable regulatory environment for starting and operating a local firm.³⁸ It is evident from these statistics that Uganda has a lot to learn from the experiences of other countries and this will be enabled by emulating South Africa's approach on the process of company formation.

This paper will also discuss the nature of companies to be formed in Uganda and make recommendations for the amendment of the relevant laws and policies.

This study will be one of the available literatures to members of the public. The paper will give them an insight into Uganda's process of company formation vis-a-vis the South African process and may be a basis to lobby for change.

Furthermore, this study may also be an added source of literature to scholars and academicians who are interested in this particular field of the law and will also be a basis for further research.

1.5 Scope of Study

The study focuses on Uganda's policy and regulatory position on the process of company formation. The established position will then be assessed in relation to government's intended objectives and whether this position complies with Uganda's-

- a) Domestic obligations: Uganda's domestic laws, Company policies and poverty eradication plans
- b) Regional obligations, and
- c) International obligations.

³⁷ The World Bank *Doing Business Report 2014* op cit note 26.

³⁸ Ibid.

In addition, the study discusses the impact of an undesirable process of company formation to Uganda's economy and based on the findings, purpose suitable recommendations will be advanced. This will be achieved by reviewing several commercial legislation like the Companies Acts³⁹, Uganda Registration Services Act Cap 210, amongst others, and all literature relevant to the subject matter in order to assess whether Uganda's entrepreneurial population enjoys the right to company formation and how the given laws have either promoted or hindered the formation process.

The study is mainly restricted to Uganda using South Africa as a benchmark on how to improve Uganda's company formation process in order to improve the commercial sector thus attain economic development.

1.6 Research methodology

The methodology for this research is by and large a comparative approach that uses desktop based research in particular documentary analysis and synthesis relevant to the body of knowledge. It compares Uganda and South Africa's approach on the process of company formation in order to make dependable conclusions on the issues discussed. It draws its conclusions from the review and analysis of relevant legal statutes, government policies, dissertations, journals, articles, treatises, protocols, textbooks, working papers, journals and newspaper articles.

Due to the contemporary nature and scarcity of literature on the subject of company formation especially in the Ugandan context, this study is to a great extent reliant on online sources and reports.

1.7 Limitations & Challenges

There is limited literature and case law relevant to the subject matter of company formation in Uganda. This makes it difficult to compare and contrast some of the adopted interpretations of

³⁹ These refer to both the old and the new Ugandan Companies Acts: The Companies Act No.1 of 2012, Laws of Uganda and The Companies Act (1961) Cap 110.

legal statutes used in this study. However, this shortfall is mitigated by reference to related cases that deal with similar conceptual matters.

1.8 Structure of study

This paper will consist of four chapters as follows;-

Chapter One: This chapter provides an overview of the formation of a company in Uganda and examines reasons why it needs to be changed. The chapter then provides the research question, statement of the problem, justification of the study, scope of the study, research methodology, limitations and challenges.

Chapter Two: Examines the origins and evolution of company law in Uganda, the types of companies that can be formed and the peculiar nature of company formation in light of the new Companies Act.⁴⁰ It also discusses the general effects of company formation, the obstacles, and the impact of an undesirable process of company formation in Uganda.

Chapter three: This Chapter delves into South Africa's process of company formation focusing on areas which could be of great importance for Uganda to emulate. This will be achieved by examining South Africa's Companies Act⁴¹ which is the main legal framework that facilitates the formation process.

This chapter will conclude by discussing some of the advantages associated with a modified process to South Africa's economy, with the view that if the same could be done by Uganda, similar trends of economic development would be achieved.

Chapter Four: This Chapter summaries the main findings of the study and makes relevant recommendations for reform of the process of company formation in Uganda. It draws on the South African experience in making recommendations and will suggest the amendment and creation of new provisions in the requisite legislation to facilitate company formation in Uganda. The suggestions to amend and create new provisions will be made with the objective to

⁴⁰ The Companies Act No.1 of 2012.

⁴¹ The Companies Act 7 of 2008.

ensure minimal disruption to the existing legislation and the economy while at the same time attempting to achieve escalated company formation and economic development in Uganda.

1.9 Dialectics

Where possible the use of the term “business” will be preferred than the more traditional term “company” because from the definition provided above, a company can purely be a business.

CHAPTER TWO

FORMATION OF A COMPANY: THE UGANDAN PERSPECTIVE

INTRODUCTION

In order to better understand the complexities of forming a company in Uganda, it is necessary to look at the laws that regulate the process, types, requirements, and objectives of incorporating a company. Accordingly, the purpose of this chapter is to provide an overview of legislation that regulates company formation in Uganda, discuss the legal consequences of incorporation, the obstacles that stand in the way of incorporating companies and how these have impacted the country's socio-economic development.

2.1 Law applicable

The formation of a company in Uganda is regulated by statutory law, common law, doctrines of equity and customary law.⁴² The 1995 Constitution of the Republic of Uganda is the supreme law of the land thus applicable.⁴³ However, the formation, administration and dissolution of companies are regulated by the Companies Act 1 of 2012, in addition to other statutes like the Companies (General) Regulations SI 110-1; the Uganda Registration Services Bureau Act, Cap 210; the Public Enterprises Reform and Divestiture Act, Cap 98; the Capital Markets Authority (amendment) Act 2011; the Business Names Registration Act, Cap 109; the Registration of Documents Act, Cap 81; the Registration of Documents (Fees) (amendment) Rules 2005; the Investment Code Act Cap 92; Income Tax Act (1997) Cap 340; the Value Added Tax (as amended) Act (2005); the Stamps Act, Cap 342 inter alia. The application of some of these statutes will be discussed at various stages throughout this paper.

⁴² Section 16 Judicature Act (1996) Cap 13, Laws of Uganda.

⁴³ Article 2 of the 1995 Constitution of the Republic of Uganda (as amended).

Ugandan courts have also developed considerable jurisprudence on the subject of company formation. Thus, in the absence of clear statutory provisions, precedent applies.⁴⁴

2.2 Evolution of the law regarding company formation in Uganda

Company law in Uganda has its roots in English common law, the doctrines of equity and the Companies Act.⁴⁵ The country has transitioned through a series of Companies' Acts like the Indian Companies Act of 1882; which was followed by the Companies Ordinance No. 6 of 1923 which was later replaced by the Companies Ordinance Chapter 212 of 1951.⁴⁶ In 1961, a new Companies Act Cap 110 (the 1961 Act) modeled after the 1948 Companies Act of England & Wales came in force for 53 years, during which it underwent minor amendments.⁴⁷ In 1996 however, major changes in relation to the management and administration of public companies were introduced. Examples include the enactment of the Capital Markets Authority Act⁴⁸ which took over the regulation of functions relating to the issue of shares and the prospectus. In 1996 also, the Public Enterprises Reform and Divestiture Act⁴⁹ revised the 1961 Act by introducing new provisions that brought certain public enterprises within the ambit of the Companies Act.⁵⁰ However, important as these legislative developments were,⁵¹ there remained several other aspects that required revision.⁵² This additional need to revise the company legislation was addressed by the Commercial Law Reform Project (CLRP) that began in 1996.⁵³ The Government of Uganda (GOU) through the Uganda Law Reform Commission (ULRC)⁵⁴

⁴⁴ The application of Common Law and Doctrines of Equity and this is by virtue of the reception clause of 11 August 1902; Also See 'Uganda's Early History' available at <http://www.infoplease.com/encyclopedia/world/uganda-history.html>, accessed on 10 August 2014.

⁴⁵ D.J. Bakibinga: *Company Law in Uganda* (2001) 1.

⁴⁶ Chapter 212 of the Companies Ordinance of the Laws of Uganda of 1951 (Revised Edition); See Uganda Law Reform Commission op cit note 35 at 7.

⁴⁷ Unlike the Companies Act of England and Wales which had gone through a number of significant amendments in order to keep abreast with the needs of that society. See Uganda Law Reform Commission op cit note 35 at 3

⁴⁸ Capital Markets Authority Act (1996) Cap 84 as subsequently amended by the Capital Markets Authority (Amendment) Act.

⁴⁹ Public Enterprises Reform and Divestiture Act 1993 Cap 98, Laws of Uganda.

⁵⁰ Uganda Law Reform Commission op cit note 35 at 4.

⁵¹ The legislative developments under the Capital Markets Act and the Public Enterprises Reform and Divestiture Act.

⁵² Bakibinga op cit note 45 at 3.

⁵³ Uganda Law Reform Commission op cit note 35 at xiii.

⁵⁴ The Uganda Law Reform Commission, established in 1990 by the Uganda Law Reform Commission Act, Cap 25, for details see, Uganda Law Reform Commission op cit note 35 at viii.

committed itself to revising the corporate laws, by implementing the Commercial Justice Sector Program (CJRP)⁵⁵ to support private sector development and encourage private investment.⁵⁶ The key objective for reform was the Companies Act in order to establish a new modern law based on “a core company law approach,” tailored to address basic laws on formation and running of companies.⁵⁷ The project also recommended that provisions of the Companies Act that related to insolvency, public offers of securities and prospectuses that were not for profit organisations and partnerships, in particular be incorporated in other legislation. This culminated into a draft Companies bill 1999.⁵⁸ However, this Bill never made it to parliament.⁵⁹ After ten years, another Companies Bill No.14 of 2009 was formulated, made it to parliament and reviewed for the first time on 18 August 2009.⁶⁰ The bill proposed a comprehensive review of the 1961 Act with specific objectives directed towards the process of company formation in Uganda. To expedite the process of reform; in 2010, the GOU with support from the World Bank, launched a four year project to reduce commercial regulatory burdens by 25% by the year 2014 in order to improve on among others, Uganda’s investment climate.⁶¹ As a result, in July 2013, the Companies Act 1 of 2012 (the new Act) came into force.⁶² The new Act is the comprehensive law that governs, among other things the formation, capitalisation, management and dissolution of companies in Uganda. The purpose of this new Act was to amend, replace and reform the law relating to incorporation, regulation and administration of companies and make provision for related matters.⁶³

To ensure alliance with modern company law; the new companies Act introduced many significant changes some of which relating to the process of company formation include the following:

⁵⁵ The CJRP is a component of a Sector Wide Approach Programme that brings together all institutions within the Justice Law and Order Sector (JLOS) aimed at improving institutional efficiency and service delivery. The programme is intended to fit in the GOU’s macro planning framework for poverty eradication. Its implementation is guided by the GOU’s avowed policies including those of economic liberalization and privatization. For details see, Uganda Law Reform Commission: A Study Report on Company Law, 2004 at xiii.

⁵⁶ Uganda Law Reform Commission op cit note 35 at 2.

⁵⁷ The Companies Act (1961) Cap 110. See Uganda Law Reform Commission op cit note 35 at 5-14.

⁵⁸ The Ms. Clare Manuel Report, Reform of the Companies Act Cap 110 found in the Uganda Law Reform Commission: A Study Report on Company Law, 2004 at 9.

⁵⁹ Uganda Law Reform Commission op cit note 35 at 7.

⁶⁰ Uganda Law Reform Commission op cit note 35 at 9.

⁶¹ Bureau of Economic and Business Affairs ‘2012 Investment Climate Statement-Uganda’ op cit note 24.

⁶² Atim op cit note 20.

⁶³ The Companies Act 1 of 2012.

The new Act simplified the form for company registration;⁶⁴ this is illustrated in the second schedule of the Act and was intended to encourage entrepreneurs to register their businesses.⁶⁵ It removes the requirement of providing information on the statement of nominal capital which limited incorporation under the 1961 Act. However, in practice, the Registrar of companies still expects this information from the incorporators. The effects of this will be discussed at a later stage in this study.

The new Act introduced the untenable concept of single member company.⁶⁶ This concept was non-existent in the 1961 Act and is meant to encourage company formation in Uganda.

However, despite the ‘so-called’ comprehensive review, the legislation still requires further review, especially with the provisions relating to the process of company formation failure of which will maintain the undesirable process whose impact will be discussed at a later stage in this chapter.

2.3 Types of Companies

Section 4 (2) of the new Act allows the formation of private and public companies that have limited or unlimited liability.⁶⁷ Limited liability companies may be incorporated as companies that are limited by shares or by guarantee.⁶⁸ Below is a detailed discussion of the two types of companies;

Private Company

Section 1 refers to a private company as an entity whose meaning falls under Section 5 (1) which provides that, a “private company” means a company which by its articles restricts the transfer of shares; limits the number of its members to one hundred, not including persons employed by the company and persons who, have been formerly employed by the company; and prohibits any

⁶⁴ Document used when registering a company.

⁶⁵ See Sebalu & Lule Advocates ‘A gap analysis Companies Act 2012’ available at. <http://www.sebalulule.co.ug/?p=490>, accessed on 14 August 2014.

⁶⁶ Section 4 (1) Companies Act 1 of 2012. See Uganda Law Reform Commission op cit note 35 at 5.

⁶⁷ Section 4 Companies Act 1 of 2012.

⁶⁸ Ibid. Also see A Busiki & Co. Advocates op cit note 22.

invitation to the public to subscribe for any shares or debentures. The new Act increases the membership of a private company to 100 shareholders.⁶⁹ The increase was introduced to enable private companies to raise more capital without necessarily offering shares to the public.⁷⁰ The increase has been viewed as a means of incentivizing and attracting investment in Uganda's private sector.⁷¹ The new Act also lifts the prohibition that bars companies from providing financial assistance to shareholders and directors for the purpose acquiring shares.⁷² However, a private company must notify the Registrar of companies when such assistance for acquisition of shares would ultimately result into consolidation of share capital, conversion of shares into stock or any related particulars.⁷³ Thus, this development in the law was intended to encourage entrepreneur's engagement in the process of company formation in Uganda.

Public Company

A public company is a company that issues securities through an Initial Public Offer (IPO) and is traded on at least one stock exchange market.⁷⁴ The new Act stipulates that every company that is not a private company is a public company.⁷⁵ A notable change of the 1961 Act⁷⁶ is that any one or more persons may incorporate a public company.⁷⁷ This change in the law is intended to encourage investment and incorporation of public companies since Uganda's commercial sector is dominated by private companies. This provision was adopted for the new Act because the success of a public company depends not on the number of incorporators but on the people buying shares in it; thus, there was no harm in reducing the number of incorporators to one. To illustrate; companies like Microsoft are public companies that were incorporated by less than

⁶⁹ Section 5 (1) (b) of the Companies Act 1 of 2012. The repealed Companies Act (1961) Cap 110 restricted the membership of a private company to 50 members.

⁷⁰ Mwesigwa N E & Sendi B K 'Overview of the Companies Act 2012' available at www.iflr1000.com/newsandanalysis/overview-of-the-companies-act-2012/index/59 accessed on 20 July 2014.

⁷¹ See Sebalu & Lule Advocates op cit note 65.

⁷² Section 65 (1) Companies Act 1 of 2012.

⁷³ Section 72 (1) Companies Act 1 of 2012.

⁷⁴ Public Company, available at www.investopia.com/terms/p/publiccompany.asp, accessed on 13 August 2014.

⁷⁵ Section 6 Companies Act 1 of 2012.

⁷⁶ Section 3 Companies Act (1961), Cap 110.

⁷⁷ Section 4(1) Companies Act 1 of 2012.

seven incorporators.⁷⁸ This company is still functional and performing very well; an indication that the success of a public company does not depend on the number of incorporators. Furthermore, incorporation and offering of securities to the public should be differentiated and appreciated because the two aspects have separate meanings and are regulated by different legislation in Uganda.⁷⁹ That is, the new Act regulates the formation of public companies while the Capital Markets Acts⁸⁰ regulates the issues relating to the offer of securities to the public.

Single-member Company

This is not one of the types of companies that may be formed is a significant development of the new Act, which compliments the types of companies that may be formed in Uganda. The new Act permits any ‘one’ or more persons to form a company with or without liability.⁸¹ However, during incorporation, the single member shall nominate two individuals, one of whom shall become a nominee director in the event of the death of the single member and the second act as an alternate nominee director in the event of the unavailability of the nominee director⁸². In the event of the death of the single member, the nominee director assumes the functions akin to those of an administrator under the Succession Act⁸³. This formation was not possible under the 1961 Act thus a welcomed attempt for Uganda to align with best international practice on the ease of company formation. A single-member company enjoys almost all the benefits of a private or public company like limited liability, separate legal personality, perpetuity amongst others. It is for this reason that the structure had continuously been advocated for as a move to ease incorporation in Uganda. This advocacy stems from the fact that most successful businesses in Uganda are single owned informal enterprises. Being informal businesses, they cannot be regulated by government which culminates in the loss of revenue especially through which could be directed towards economic development. Thus, the development in the law is expected to lure single informal business owners towards incorporation.

⁷⁸ ‘A history of Windows’ available at, <http://windows.microsoft.com/en-ZA/windows/history#T1=era0>, accessed on 14 August 2014. A similar incorporation of a public company was impossible under the Companies Act (1961) Cap 110.

⁷⁹ Uganda Law Reform Commission op cit note 35 at 5.

⁸⁰ The Capital Markets Authority (amendment) Act 2011.

⁸¹ Section 4 (1) Companies Act 1 of 2012.

⁸² Section 186 Companies Act 1 of 2012.

⁸³ Succession Act 1906 Cap 162. Also see Sebalu & Lule Advocates op cit note 65.

On the other hand, the addition of the possibility of incorporating a single member company under the new Act has been criticized on the following grounds: the possibility of a single member company to be formed with the purpose of tax evasion; the limited marginal ability of a single member to take on all the responsibilities of management of the firm; and for suspected fraud when all the affairs of the firm are handled and controlled by one person. The criticisms maybe addressed by the stringent requirements of incorporating single-member companies. Section 186 of the new Act provides for the appointment of the nominee director, as previously discussed. The nominee director is mandated to manage the affairs of the company in case of the death of the single member until the transfer of shares to the legal heirs has been effected. The nominee director is also required to inform the Registrar of Companies of the death of the single member, provide particulars of the legal heirs and in case of any impediment, report the circumstances on the impediments seeking direction from the Registrar of Companies within fifteen days after the death of the single member.

2.4 Pre-incorporation contracts

During the process of company formation, incorporators usually enter into contracts with third parties for the benefit of the company and when they do so; they do so on behalf of the unincorporated company.⁸⁴ Under the 1961 Act, such contracts were not binding on the company but bound the incorporator because the company was non-existent, thus had no capacity to contract.⁸⁵ However, the new Act provides that such contracts may be adopted by the company on incorporation without the need for novation where subsequently the liability of the incorporator shall cease to exist.⁸⁶ This means that contracts which are made on behalf of the company before the company is incorporated have the same effect as if the contracts were entered into with the person purporting to act for the company once it's registered if the company chooses to ratify the contracts.⁸⁷ This development in law fosters company formation in Uganda on several fronts because oft-times incorporators require clarity on certain transactions before

⁸⁴ Bakibinga op cit note 45 at 20.

⁸⁵ *Kelner v Baxter* (1866), L. R. 2 C. at 174.

⁸⁶ Section 54 Companies Act 1 of 2012.

⁸⁷ For a further understanding on the concept of pre-incorporation contracts; see Sebalu & Lule Advocates op cit note 65.

they engage in company formation hence pre-incorporation contracts.⁸⁸ The ability to confer liability through such contracts to the unincorporated company fosters an increased level of credibility and encourages parties to engage in business transactions.

2.5 The process of formation of a company

Incorporators

Incorporators are individuals responsible for company formation.⁸⁹ In Uganda, any one or more persons whether a national or a foreigner may for a lawful purpose form a company, by subscribing their names to a memorandum of association or otherwise complying with the requirements of the Companies Act in respect of registration; form an incorporated company, with or without limited liability.⁹⁰

Registrar of Companies

An incorporator must seek the services of the Registrar of companies in order to register a company in Uganda.⁹¹ The Registrar of Companies (herein referred to as the Registrar) is appointed under the Uganda Registration Services Bureau Act⁹² to perform the duties of registering companies.⁹³ On registration of the company, the Registrar issues the incorporator with a certificate of incorporation and accords a registration number which must appear on all the company's official documents.⁹⁴

The Company Name

Reservation of a company name initiates the process of company formation in Uganda. It is the responsibility of the incorporators to select a suitable name for their company.⁹⁵ Thereafter, an application to the Registrar for the name reservation must follow.⁹⁶ The Registrar then undertakes a search of the proposed name from the company registry, to ensure that it has not

⁸⁸ M F Cassim 'Pre-incorporation Contracts: The Reform of Section 35 of the Companies Act' (2007) 124(2) SALJ 364

⁸⁹ Cassim F H I, Cassim M F, Cassim R, Jooste R, Shev J & Yeats J L *Contemporary Company Law* 2ed (2011) 107

⁹⁰ Section 4 (1) of the Companies Act 1 of 2012

⁹¹ Section 1 Companies Act 1 of 2012

⁹² The Uganda Registration Services Bureau Act, Cap 210,

⁹³ Section 262 Companies Act 1 of 2012

⁹⁴ See Sebalu & Lule Advocates op cit note 65.

⁹⁵ Cassim et al op cit note 89 at 113.

⁹⁶ Section 36 Companies Act 1 of 2012

been registered by another company.⁹⁷ The process of name searching is manual and as such may take a minimum of five working days to be completed. Once the name is available and suitable for incorporation, it is approved and maybe reserved for up to thirty days.⁹⁸ However, where the Registrar is of the opinion that the proposed name is undesirable and might be misleading to the public, he or she may direct that the name be changed.⁹⁹ If the incorporators do not heed to this, the company may not be registered.¹⁰⁰ This was illustrated in *London Overseas Trading Co. v The Raleigh Cycle Co. Ltd.*¹⁰¹ The appellant applied for the registration of the word “Lale”. The respondents opposed the application on the ground that the word “Lale” was phonetically identical with the word Raleigh. The Registrar upheld the objection. On appeal to the High Court, the appellant submitted that the registrar was not entitled to take judicial notice that the type of bicycle manufactured by the respondent company was known in the trade and by the public in Uganda as “Raleigh” and that there was no evidence before him upon which he could base such a finding. It was held that it was open to the Registrar to find that the mark by being likely to deceive or cause confusion would be disentitled to reservation and protection by the court. This indicates inter alia that the Registrar cannot reserve a name that is confusingly similar to that in the company’s registry because that name would be likely to mislead the public, thus it’s prohibited in Uganda to trade under a misleading name.¹⁰²

Documents of Incorporation

The law provides the following documents as prerequisite inspection and submission to the Registrar during the process of company formation.

⁹⁷ Section 36 (1) Companies Act 1 of 2012.

⁹⁸ Ibid.

⁹⁹ Section 36 (2) & 37 Companies Act 1 of 2012 .

¹⁰⁰ Busiki & Co. Advocates op cit note 22.

¹⁰¹ [1959] EA at 1012.

¹⁰² Section 38 Companies Act 1 of 2012.

The name reservation form

This serves as proof that the company name sought to be registered is available to be reserved, has been reserved and its use has been approved by the Registrar of companies.¹⁰³

The Memorandum of Association (MOA)

This is the company's most important document during incorporation as it determines the powers of the company.¹⁰⁴ Consequently, a company may only engage in activities and exercise its powers to the extent of the powers conferred upon it by the MOA or by implication therefrom. That is, the powers exercisable by the company must be reasonably incidental to the fulfillment of the objects as contained in the MOA.¹⁰⁵ To illustrate, Bowen L.J. in *Guinness v Land Corporation of Ireland*¹⁰⁶ stated that,

“...the memorandum of association contains the fundamental conditions upon which alone the company is allowed to be incorporated.”

In Uganda, the MOA is required to be printed in the English language.¹⁰⁷ No provision is made for translation in other languages.¹⁰⁸ It should further contain the company name, the registered office, and the objects clause inter alia.¹⁰⁹ However, the MOA may also contain a general objects clause stipulating that, the object of the company is to carry on business or any incidental activity to carrying on business.¹¹⁰ This simplifies the condition of the 1961 Act¹¹¹, which required an elaboration of the objects of the company contained in the MOA. This speaks to the objective of simplification of the process of company formation. Additionally; this new development essentially abolishes the operation of the doctrine of *ultra-vires* which curtailed incorporation under the 1961 Act.¹¹² Furthermore, the issue of alteration of the contents of the MOA is brought

¹⁰³ Busiki & Co. Advocates op cit note 22.

¹⁰⁴ Bakibinga op cit 45 at 27.

¹⁰⁵ J F Northey & L H Leigh's *Introduction to Company Law* 3rd Ed (1983) 30-31

¹⁰⁶ (1882) 22 Ch.D 349 at 381.

¹⁰⁷ Section 7(1) Companies Act 1 of 2012.

¹⁰⁸ For details on the notion of translation of company documents see Cassim et al op cit note 89 at 135.

¹⁰⁹ Section 7(1) Companies Act 1 of 2012.

¹¹⁰ Section 7(5) Companies Act 1 of 2012.

¹¹¹ Section 4 Companies Act (1961) Cap 110.

¹¹² For further details on the subject, see Sebalu & Lule Advocates op cit note 65.

under the mandate of the Registrar¹¹³, instead of an application to a court as was required by the repealed Companies Act which equally aims at simplifying the incorporation process.¹¹⁴

Articles of Association (AOA)

Section 11 of the new Act stipulates that, it shall be lawful for a company, in addition to its MOA to file Articles of Association. The AOA contain regulations for managing the internal affairs of the company.¹¹⁵ The regulations are applied and interpreted subject to the MOA in that they cannot confer wider powers on the company than that stipulated in the MOA. Thus, where there is a conflict between the MOA and AOA, the provisions of the MOA must prevail.¹¹⁶ However, it has been suggested that where the MOA is ambiguous or is silent on a particular issue, it may be permissible to resort to the AOA in order to resolve the ambiguity or supplement the MOA.¹¹⁷ This approach may be supported by the statement of Jessel, M. R. in *Re: Wedgwood Coal and Iron C.*¹¹⁸ which states that;

‘Where there are two contemporaneous documents executed and assented to by the same persons at the same time...it appears to me that the ordinary rule applies according to which contemporaneous documents are read together, so that if there is an ambiguity in one it may be explained by the other.’

However, if the uncertainty arises from some matter which is by statute required to appear in the MOA, the AOA cannot be resorted to in order to modify the MOA.¹¹⁹ In the words of Bowen L.J in *Guinness v Land Corporation of Ireland*:¹²⁰

‘The memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors and the outside public, as well as the shareholders. The Articles of Association are the internal regulations of the company. How can it be said that in all cases the fundamental conditions of the charter of incorporation and the internal regulations are to

¹¹³ Section 44 Companies Act 1 of 2012.

¹¹⁴ Section 24 Companies Act (1961) Cap 110.

¹¹⁵ Bakibinga op cit note 45 at 40.

¹¹⁶ Ibid at 41.

¹¹⁷ *Re Duncan Gilmour & Co. Ltd* [1952]2 All E.R. at 871.

¹¹⁸ (1877) 7 Ch.D.75 at 99.

¹¹⁹ Bakibinga op cit note 45 at 41.

¹²⁰ (1882) 22 Ch.D. 349 at 381.

be construed together?...In any case it is, as it seems to me certain that for anything which the Act of Parliament says shall be in the memorandum, you must look at the memorandum alone. If the legislature has said that one instrument is to be dominant, you cannot turn to another instrument and read it in order to modify the provisions of the dominant document...’

It can therefore be deducted that the MOA and AOA are meant to be construed separately.

Statutory Forms of the MOA and the AOA

The new Act stipulates that the statutory documentary forms for the registration of the Memorandum and Articles of Association are to follow the prescribed format under section 17 of the Act. This standardization of documents used in company formation eliminates the confusion in the structure relating to the documents of incorporation and in turn is meant to ease the process of company formation. However, this provision of the new Act has often been described as rigid thus in much need for review as it curtails the process in Uganda by prescribing the format of the documents to be adopted during incorporation.

Statutory Declaration

A statutory declaration is a document filed with the Registrar by a legal practitioner or other authorized personnel to incorporate a company as sufficient evidence of compliance with all the requirements of company formation under the new Act.¹²¹ This document accompanies all the other requisite documents and marks the end of the incorporator’s role in the process of company formation. At this stage, the onus solely lies with the Registrar of companies to either register the company or not.¹²²

¹²¹ Section 22 (2) Companies Act 1 of 2012.

¹²² See Sebalu & Lule Advocates op cit note 65.

Payment of requisite fees

This is a stage that authenticates the process of company formation in Uganda.¹²³ The fees payable are assessed by the Registrar with guidance from the relevant legislation;¹²⁴ payment of which indicates the imminent completion of the process of formation of a company.¹²⁵

Company Registration

After all the above stages have been complied with, the process of company registration ensues. The documents of incorporation must be presented together with a receipt acknowledging payment of the requisite fees in order for the Registrar to accept their submission.¹²⁶

Under Section 18 of the new Act, a company is registered by filling in the particulars contained in the registration form in the second schedule. If the Registrar is satisfied that the applicant has complied with all the requirements as stipulated by the relevant statutes, the Registrar shall register the company and assign to it a registration number.¹²⁷ Upon registration, the Registrar issues a certificate of incorporation as conclusive evidence that all the requirements in the Companies Act as well as other legislation, matters of precedent and incidental to company registration have been complied with and that the association is a company duly registered under the new Act.¹²⁸

Registration of Public Companies

Formation of a public company follows the process discussed above; however, it has to be vetoed by the Capital Markets Authority (CMA) from its initial stages because this type of

¹²³ Healy Consultants op cit note 16.

¹²⁴ Legislations like the Stamps Act Cap 342; the Registration of Documents (Fees) (amendment) Rules 2005 amongst others.

¹²⁵ There several requisite fees to be paid during the process of company formation in Uganda. A break down of the fees payable may be accessed from the Uganda Registration Services Bureau, available at, http://www.ursb.go.ug/index.php?option=com_content&view=article&id=31&Itemid=119, accessed on 25 Aug 2014.

¹²⁶ Healy Consultants op cite note 16.

¹²⁷ Business Licencing Reform Committee 'Report on Uganda's Business Licencing Reforms' at vii available at, http://www.businesslicences.go.ug/asset_uplds/files/BLRC%20Executive%20Report-Vol_1.pdf, March 2012, accessed on 18 August 2014

¹²⁸ Section 22 (1) Companies Act 1 of 2012.

company allows for the public to invest in the company by buying shares through an Initial Public Offering (IPO).¹²⁹

It is also worth noting that the new Act provides for a comprehensive and chronological change of re-registering a private company to a public company.¹³⁰ A private company could only undertake registration as a public company, if the incorporators were prepared to engage with the process of formation of a public company.¹³¹ This simplification of registration of a private company to a public company is meant to encourage the formation of public companies in Uganda.

Business Commencement

In Uganda, commencement of business after registration of a company as illustrated above is officiated by the issue of a trading licence.¹³² This licence is issued by the approved local authority on payment of the requisite fees in the area that the business intends to operate.¹³³ If the registration is approved, the local authority needs to be sought to issue the trading licence. Naturally the incorporator will not or cannot operate if the trading licence is not issued. To illustrate; if a business operates in Kampala, one needs to acquire a trading licence from the Kampala City Council Authority (KCCA).¹³⁴ This licence is issued on payment of the prescribed fees.¹³⁵ This licence stifles the engagement in the process of company formation because it increases on the compliance requirements an incorporator must adhere to. Thus, resulting into a wide spread informal sector in Uganda.¹³⁶

¹²⁹ Section 60 Companies Act 1 of 2012.

¹³⁰ Sections 24 to 27 Companies Act 1 2012.

¹³¹ Healy Consultants op cit note 16.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ The process is regulated by the Trade (Licensing) Act, Cap 101 and the Trade (Licensing) Regulations, 2012.

¹³⁵ The fees are regulated by the Trade (Licensing) Act, Cap 101 and issued by the authorised local authority.

¹³⁶ World Bank 'Economic Overview Uganda' op cit note 14.

Tax requirements

Uganda has a residence based tax system.¹³⁷ Thus, incorporators must take note of and are liable to pay several taxes during the process of company formation and when the business has been formed and is operational.¹³⁸ Some of the taxes to be paid include; company Income tax¹³⁹ at a rate of 30% per annum; Capital gains tax which is levied on the disposal of the company's assets; Value Added tax (VAT),¹⁴⁰ for goods and several services at a rate of 18%; Local Service tax and 'Pay As You Earn' tax (PAYE) which is deducted from the salaries of the employees.

Notably, a stamps duty is levied on all the documents submitted for registration. This levy is regulated by the Stamps Act, Cap 342 and varies from one document to another.

Registered Offices

It is mandatory for a company registered under the new Act to provide details of its registered office and a registered postal address on the day on which it commences business or as from the fourteenth day of incorporation.¹⁴¹ In the event of non-compliance, the Registrar reserves the right to de-register such a company upon notice in the Government Gazette (GG) and a newspaper of wide circulation.¹⁴² Furthermore, the registrar may impose a default fine.¹⁴³ This provision has been criticized for giving excessive powers to the Registrar of companies and a proposal for the imposition of the fine has been suggested to be left to the discretion of the courts in Uganda.¹⁴⁴

Registration of foreign Companies in Uganda

Registration of foreign companies in Uganda is provided for under the new Act in association with other requisite legislation. Foreign companies are companies incorporated outside Uganda but are registered and continue to hold a place of business in Uganda.¹⁴⁵ They may be wholly owned or partially owned by foreign nationals. The registration of these companies follows all

¹³⁷ For details visit, <http://www.ensafrica.com/law-firm/uganda>, accessed on 15 Aug 2014

¹³⁸ Bureau of Economic and Business Affairs '2013 investment Climate Statement – Uganda' op cit note 15.

¹³⁹ Regulated by the Income Tax Act (1997) Cap 340

¹⁴⁰ Regulated by the Value Added Tax (amended) Act 2005

¹⁴¹ Section 115 of the Companies Act 1 of 2012

¹⁴² Section 115 (2)-(5) Companies Act 1 of 2012

¹⁴³ Section 116(3) Companies Act 1 of 2012

¹⁴⁴ See Sebalu & Lule Advocates op cit note 65.

¹⁴⁵ Section 251 Companies Act 1 of 2012

the domestic requirements of company formation as discussed above,¹⁴⁶ as well as the prerequisites of foreign company registration under the Investment Code Act.¹⁴⁷ Thus, it may be concluded that foreign companies undergo double mandatory registration in order formally operate business in Uganda.

The Investment Code Act establishes the Uganda Investment Authority (UIA) to regulate the registration of foreign companies in Uganda. This is through the issue of an investment licence as stipulated in section 11 of the Act.¹⁴⁸ However, a foreign investor who is intending to engage in trade only is not required to obtain an investment licence but must incorporate the company with the Registrar of Companies as is required by law and must make a deposit of the a sum of US\$ 100 000 or its equivalent in Uganda shillings (UGX) at the Bank of Uganda (BOU).¹⁴⁹ This cash deposit is meant to be used for the importation or direct purchase of goods for the business.¹⁵⁰

Once the company has been registered as illustrated above; the incorporator must lodge an application in writing to the immigration department to be issued with a permit as a foreign investor.¹⁵¹ This permit enables him/her to lodge an application to the local authority where the business will be principally carried out for a trade licence, receipt of which he or she can commence business.¹⁵²

Notably, the Investment Code Act prohibits foreign investors to operate business of crop production, animal production or acquire or be granted or lease land for the purpose of crop production or animal production.¹⁵³ However, in a bid to encourage the formation of foreign companies in Uganda, the government grants generous incentives like tax holidays for foreign

¹⁴⁶ For example, Sections 252-260 Companies Act 1 of 2012; the Uganda Registration Services Bureau Act, Cap 210.

¹⁴⁷ Investment Code Act, Cap 92.

¹⁴⁸ Ibid.

¹⁴⁹ Section 10 (5) (a) & (b) Investment Code Act, Cap 92.

¹⁵⁰ See Healy Consultants op cit note 16.

¹⁵¹ Section 10 (7) & (8) Investment Code Act, Cap 92.

¹⁵² Section 10 (9) Investment Code Act, Cap 92.

¹⁵³ Section 10 (2) Investment Code Act, Cap 92.

investors, incentives for research, mineral exploration and importation of plant machinery, as well as incentives to the education and agricultural sector.¹⁵⁴

The government has bilateral investment treaties with countries like South Africa, Egypt, France, United Kingdom and has regional and international obligations that include the Common Market for Eastern and Southern Africa (COMESA), the Preferential Trade Area (PTA) and, the East African Community (EAC). All of these organisations can be used as platforms to foster the incorporation of foreign companies in Uganda. However, despite an established regulatory framework and added incentives for the registration of foreign companies; the rate of foreign registrations is low.¹⁵⁵ This is associated with the rigid and numerous requirements of company registration as discussed above, the impact of which will be discussed at a later stage in this chapter.

2.6 Effects of Company formation

The foundation of company law rests on the principle that a company has separate legal personality.¹⁵⁶ This legal personality is an artificial one which is distinguishable from natural personality. The possession of legal personality implies that a company is capable of enjoying rights albeit subject to duties, separately from its members.¹⁵⁷ This principle was first distinctly articulated by Lord Macnaghten¹⁵⁸ when he stated that:

‘...the company is at law a different person altogether from the subscribers...; and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits of the company, the company is not in law the agent of the subscribers or trustee for them...’

Thus, companies can own property, are expected to pay taxes, enter into contracts, sue and can be sued independently of those who own them and are responsible for their own debts and actions as long as they are organised, managed and maintained as true separate legal entities.

¹⁵⁴ For further details on the incentives granted to foreign investors, see Sections 5-20 Investment Code Act, Cap 92.

¹⁵⁵ Bureau of Economic and Business Affairs ‘2013 investment Climate Statement – Uganda’ op cit note 15.

¹⁵⁶ Cassim et al op cit note 89 at 29.

¹⁵⁷ Bakibinga op cit note 45 at 4.

¹⁵⁸ *Salomon v Salomon & Co. Ltd* [1897] A.C. 22 H.L at 51

The discussion that follows generally examines the consequences of incorporation;

Limited Liability

The principle of limited liability is a characteristic of company formation, at the core of company law.¹⁵⁹ Limited liability means that the liability of shareholders for the company's debts is limited to the amount they have paid to the company for its shares.¹⁶⁰ This encourages risk-taking in the corporate venture¹⁶¹ by ensuring that the shareholders are not entirely liable for the debts of the company.¹⁶² This means that shareholders are under no obligation to the company or its creditors beyond the extent of their obligations based on the value of their shares.¹⁶³ Thus, claims of creditors are confined to the assets of the company; they cannot obtain satisfaction of their debts from the personal assets of the shareholders of the company because the debts and liabilities of the company are those of the company alone and not of its shareholders. This principle was upheld in the Ugandan case of *Sentamu v UCB*¹⁶⁴, where when a claim for the company's debt was instituted against its managing director. It was held that individual members of the company were not liable for the company's debts. Even a managing director of a company could not be held liable for the company's debts. Thus, the concept of limited liability encourages the growth and expansion of companies, which is of crucial importance to the development of the economy because successful companies generate government revenue and employment. Further, limited liability enables entrepreneur's to limit their risks when engaging in certain business.

However, it is the shareholders that enjoy limited liability and not the company, which is fully liable for its debts. Thus, it is not correct to describe a company as a limited liability company.¹⁶⁵ To illustrate; Capital Shoppers Limited is one of the biggest and fastest growing businesses in Uganda which has benefited from incorporation.¹⁶⁶ This venture started as a small family store ("duka") in the busy area of Nakasero market, a suburb of Kampala central business district and it has risen to one of Uganda's most reputable businesses putting "dukas" out of business.

¹⁵⁹ Cassim et al op cit note 89 at 35.

¹⁶⁰ Ibid.

¹⁶¹ See The Economist 1999. "Limited Liability Is Born" Special Edition. 23 December 1999.

¹⁶² See *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) para 6.

¹⁶³ Cassim et al op cit note 89 at 35.

¹⁶⁴ [1983] HCB at 59.

¹⁶⁵ Cassim et al op cit note 89 at 35.

¹⁶⁶ B Rwothungye 'Capital Shopper's unstoppable growth' *New Vision* 28 June 2014

Although it is a privately owned family business, by virtue of incorporation, the incorporators cannot be liable for the debts of the business but rather; Capital Shoppers Limited is liable for its own debts by virtue of limited liability as discussed above. Additionally, Capital Shoppers Limited has also been credited for employing over one thousand Ugandans, thus contributing to the labour market in Uganda by providing jobs to the local population.

Property

An incorporated entity is able to own property separately from its members.¹⁶⁷ The advantage of this is that members cannot directly interfere with the company's property.¹⁶⁸ To illustrate, in 2002 Stanbic Bank (Uganda) Ltd acquired 90% shareholding on Uganda Commercial Bank (UCB).¹⁶⁹ This shareholding in UCB is a property of Stanbic Bank (U) Ltd and not of its incorporators or shareholders. It is only when the company is liquidated that the shareholders have a right to share in a division of the company's assets.¹⁷⁰

In addition to the above; it is also settled law that a company can occupy business premises as a tenant in Uganda.¹⁷¹ This was illustrated in the case of *Kampala Cotton Co. Ltd v Madhavani*, where the stipulated principle was re-echoed in verbatim.¹⁷²

Perpetuity

Companies have perpetual existence, which means that unlike other forms of business that cease to exist in the event of bankruptcy or the withdrawal or death of the owners; their continuity remains.¹⁷³ To illustrate, the oldest company be incorporated is the Hudson's Bay Company

¹⁶⁷ *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550-1

¹⁶⁸ *Macaura v Northern Assurance Co Ltd* [1925] AC 619

¹⁶⁹ 'Uganda's largest bank for sale' *BBC NEWS* 17 October 2001; For more details on this acquisition also visit www.stanbicbank.co.ug/uganda/Stanbic-Bank-Uganda/About-us, on the History of Stanbic Bank Uganda, accessed on 17 August 2014.

¹⁷⁰ *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd* 1962 (1) SA 458 at 471-2

¹⁷¹ See Healy Consultants op cit note 16.

¹⁷² (1954) 21 EACA at 129.

¹⁷³ Cassim et al op cit note 89 at 36.

which was formed in 1670 and is still in business.¹⁷⁴ Thus, companies are true separate entities from those who form and own them; and will outlive shareholders as long as they are maintained and operated properly.

Corporate Status

Company formation provides a business with a corporate image.¹⁷⁵ This status makes a business appear larger, more established, professional and reliable. As a result, an incorporated company will be deemed as a safer option for potential investors, lenders, clients and suppliers to engage with. Many larger firms and organisations are reluctant to get involved with unincorporated businesses; therefore registering a company can attract business opportunities and further the potential of the company.¹⁷⁶ A similar view was advanced by Lord Macnaghten¹⁷⁷ when he stated that;

‘Among the principal reasons which induce persons to form private companies...are the desire to avoid the risk of bankruptcy, and increased facility afforded for borrowing money. By means of a private company...a trade can be carried on with limited liability, and without exposing the persons interested in it in the event of failure to the harsh provisions of the bankruptcy law...’

However, when the corporate veil established on incorporation is pierced; the protection afforded to the shareholders and directors is removed and the substance of the company is examined, rather than the form in which it has been cast.¹⁷⁸ This has been considered as the negative effect of incorporation.¹⁷⁹ In such a situation, the statutes¹⁸⁰ and case law¹⁸¹ look at the people behind the company rather than the cloak of incorporation to attach liability for improper transactions of

¹⁷⁴ The Hudson’s Bay Company History. Available at, http://www.gov.mb.ca/chc/archives/hbca/about/hbc_history.html, accessed on 12 Aug 2014.

¹⁷⁵ Bakibinga op cit note 45 at 5.

¹⁷⁶ <http://www.1800company.com/start-up-advisor/top-reasons-to-form-a-corporation>, accessed on 12 August 2014

¹⁷⁷ *Salomon v Salomon & Co Ltd* [1897] AC 22 H.L at 52.

¹⁷⁸ Cassim et al op cit note 89 at 40.

¹⁷⁹ See further, Exceptions of the principle of separate legal personality in Cassim et al op cit note 89 at 41-50.

¹⁸⁰ Section 20 Companies Act 1 of 2012.

¹⁸¹ *Daimler Co Ltd v Continental Tyre and Rubber Co* [1916] 2 AC 307.

the company. This was observed in *Dunlop Nigerian Industries Ltd v Forward Nigerian Enterprises Ltd & Farore*¹⁸² when Ajoso-Adeogun, J stated that;

‘...in particular circumstances e.g. where the device of incorporation is used for some illegal or improper purpose, the court may disregard the principle that a company is an independent legal entity and ‘lift the veil’ of corporate identity so that if it is proved that a person used a company he controls as a cloak for an improper transaction he may be made personally liable to a third party.’

In Uganda, the principle was employed to attach liability to the incorporators of ‘Adfast Incorporation’, a registered company which defrauded several Ugandans of millions of shillings and the founder was hiding behind the cloak of incorporation to escape liability of his actions.¹⁸³

Thus, corporate personality attained on formation of a company comes with advantages as well as disadvantages as discussed above.

2.7 Obstacles of incorporation in Uganda

Uganda’s economic development focus since 1990 has been to promote a private sector led economy and this aligns with the rate of formal business establishments in an economy.¹⁸⁴ A number of initiatives have been undertaken by the government to create an enabling business environment and minimize the cost of doing business in order to attract more domestic and international investments.¹⁸⁵ Thus, in recent years, Uganda has registered over 25 400 formal business establishments, 91% of which fall in the category of micro, small and medium enterprises (MSMEs), and contribute about 20% of the GDP.¹⁸⁶ However, the process of company formation in Uganda has relatively not been engaged with especially by entrepreneurs operating SME’s which the vast majority of businesses in Uganda are. The discussion that follows delves into some of the reasons why especially the local entrepreneurs, have not engaged with the process of company formation in Uganda.

¹⁸² 1976 N.C.L.R. 243 .

¹⁸³ Details available at B Kwesiga ‘Club Rouge Boss Arrested’ Red Pepper 10 May 2010.

¹⁸⁴ World Bank ‘Economic Overview Uganda’ op cit note 14.

¹⁸⁵ Business Licencing Reform Committee op cit note 127.

¹⁸⁶ Government of Uganda Report on the Business Register, 2002/2002 Kampala: Uganda Bureau of Statistics.

Centralized registration

The process of company formation in Uganda can only be done in Kampala. However, Uganda is divided into 111 districts¹⁸⁷, all of which need access to this service if formal businesses are to be established in the different districts. This has rendered the service inaccessible especially to the districts far away from Kampala. Thus, the rural population which constitutes of 70% of entrepreneurs in Uganda¹⁸⁸ has been resigned to establishing and operating informal businesses due to limited access to the company registration facilities in their respective districts.¹⁸⁹ Centralization of the formation process could be deemed as the predominant reason why, particularly the rural entrepreneurs have not engaged with formal businesses in Uganda.

In addition, Uganda's dilapidated road and bridge infrastructure curtails the movement from the rural areas to Kampala in order to access this service.¹⁹⁰ This leaves this class of entrepreneurs with no choice but to operate informal businesses the impact of which will be discussed later in this chapter of the study.

Manual registration process

In June 2013, with the support of the World Bank, the Uganda Registration Services Bureau launched a digitized web-based platform¹⁹¹ for company registration and the search of business names to avoid the bureaucratic nature of the manual registration.¹⁹² However, this system is inoperative to date and incorporators still engage with a manual process of incorporation. The manual process is time consuming and very costly and often leads to the loss of registration files because the company's register is not well maintained and is characterized by inadequate filing

¹⁸⁷ List of Local Government Districts available at, www.molg.go.ug/local-governments#cite_note-district-0, accessed on 19 August 2014.

¹⁸⁸ R Namatovu & S Dawa 'Understanding Women Micro and Small Business Entrepreneurs in Uganda' available at, <http://www.trustafrica.org/en/publications-trust/icbe-research-reports?download=90:understanding-women-micro-and-small-business-entrepreneurs-in-uganda&start=20>, accessed on 12 August 2014 P.16

¹⁸⁹ Business Licencing Reform Committee op cit note 127.

¹⁹⁰ Bureau of Economic and Business Affairs '2013 investment Climate Statement – Uganda' op cit note 15.

¹⁹¹ Uganda's e-registry portal available at www.businesslicences.go.ug/index.php, accessed on 19 August 2014.

¹⁹² Online Company Registration now possible in Uganda, available at, www.humanipo.com/news/6646/online-company-registration-now-possible-in-uganda/, accessed on 19 August 2014.

systems.¹⁹³ This state of events has deterred many especially micro business owners from engaging with the process in Uganda.

Documentation

Several documents as previously discussed are required for the process of company formation in Uganda.¹⁹⁴ The complexity of these documents is not well elaborated in the new Act as well as the URSB. This poses a difficulty in using them during the formation process. Furthermore, the process still requires the registration of archaic documents like the MOA and AOA as previously discussed. This increases the incorporator's documentation and paper work hence renders the process cumbersome and undesirable.¹⁹⁵ Thus, local entrepreneurs in a bid to avoid the hefty paper work have resorted to running their enterprises as informal businesses and not engaging with the process of company formation in Uganda.

Language barrier

Formation of a company in Uganda is conducted in the English language.¹⁹⁶ However, it is estimated that there are around 40 different languages regularly used when conducting business in Uganda.¹⁹⁷ Many local entrepreneurs do not have the proficiency in the English language and are kept away from engaging with company formation on those grounds.

Exorbitant legal fees

It's an established practice that company formation in Uganda is effected by legal personnel.¹⁹⁸ However, these render this service at exorbitant fees, rendering it accessible for a particular class of entrepreneurs thus limiting the number of entrepreneurs who engage with the process in Uganda.

¹⁹³ Business Licencing Reform Committee op cit note 127.

¹⁹⁴ Busiki & Co. Advocates op cit note 22.

¹⁹⁵ Uganda Law Reform Commission op cit note 35 at 10

¹⁹⁶ Section 7 & 15 Companies Act 1 of 2012

¹⁹⁷ Khamalwa J W 'Ugandan AMDI Research Report' available at, www.katutandike.org/facts-about-uganda, accessed on 19 August 2014

¹⁹⁸ See Healy Consultants op cit note 16.

Corruption

Corruption is a serious problem in Uganda which curtails the process of company formation.¹⁹⁹ A December 2012 report on corruption by the Inspectorate of Government characterized corruption in Uganda as rampant and noted that “corruption causes distortions of a great magnitude in Uganda’s economy”²⁰⁰ Further, Uganda was ranked 140 of 177 countries in the global measure of corruption survey by Transparency International in 2013.²⁰¹ Due to corruption and red tape, many businesses in Uganda find it more profitable to operate in the informal sector. Investors often complain that government officials often require under-the-table cash payments in person at the registration offices to assist them with the formation process.²⁰² This has affected company formation at a domestic and international level. Thus, the perceived deterioration of governance and increase in corruption threatens Uganda’s image as a development model²⁰³ and challenges its future development efforts especially dependent on the company formation.

Commercial Justice System

The commercial justice system in Uganda has fared badly because commercial life in Uganda starting with company formation has been encumbered for several decades.²⁰⁴ There is rampant judicial corruption and procedural delays especially caused by well-connected defendants during the judicial process. This undermines the principle of incorporation that an incorporated company can sue and be sued.²⁰⁵ Further, some investors have complained that the legal process in Uganda, favors local entrepreneurs at the expense of foreign entrepreneurs; political pressures often disrupt and delay judicial outcomes and government agencies are slow and reluctant to follow court rulings.²⁰⁶ This minimizes the enthusiasm of entrepreneurs to engage in company formation in Uganda.

¹⁹⁹ Bureau of Economic and Business Affairs ‘2013 investment Climate Statement – Uganda’ op cit note 15.

²⁰⁰ Available at, <http://www.igg.go.ug/publications/>, accessed on 19 August 2014 .

²⁰¹ Available at, <http://cpi.transparency.org/cpi2013/>, accessed on 19 August 2014.

²⁰² Bureau of Economic and Business Affairs ‘2013 investment Climate Statement – Uganda’ op cit note 15.

²⁰³ World Bank ‘Economic Overview Uganda’ op cit note 14.

²⁰⁴ Bureau of Economic and Business Affairs ‘2013 investment Climate Statement – Uganda’ op cit note 15.

²⁰⁵ Cassim et al op cit note 89 at 40.

²⁰⁶ Bureau of Economic and Business Affairs ‘2013 investment Climate Statement – Uganda’ op cit note 15.

Duration of company formation

The incorporation process in Uganda involves a substantial amount of time to be completed. Studies have shown that simple incorporations like singly owned businesses can take up to 33 business days to be completed.²⁰⁷ Entrepreneurs generally do not have the patience and the willingness to dedicate 33 working days or more to the process. They in-turn resort to informal businesses and bribing local authorities in order to operate businesses since they do not have the requisite paper work to obtain a trading licence as previously discussed. Notably, it takes even a longer time to incorporate companies like Oil mining companies.²⁰⁸ This limits the registration of foreign companies to help with the oil extraction in Uganda since the GOU does not have the resources and the requisite skills to mine its minerals.

Lack of requisite information

Information has become so crucial and essential in the economic, social and cultural development of economies worldwide that the 21st century has been dubbed as the “Age of Information.”²⁰⁹ However, the entities regulating the process of company formation in Uganda have not sufficiently availed the necessary information regarding the process to the domestic and foreign entrepreneurs. This has deterred especially the grass roots incorporator in the rural areas of Uganda from engaging with the process of company formation because they do not know what it entails, the benefits as well as the disadvantages associated with it.

Political Violence

Uganda’s political environment is highly unpredictable making it unsuitable for forming and operating businesses.²¹⁰ The regional terrorism threat remains high, and there has been a

²⁰⁷ Healy Consultants op cit note 16.

²⁰⁸ Bureau of Economic and Business Affairs ‘2013 investment Climate Statement – Uganda’ op cit note 15.

²⁰⁹ J. Oloka-Onyango & J. Tumusiime: ‘*How much do we really know?*’ Decentralization, Access to Information and Improving Accountability in Uganda, HURIPEC WORKING PAPER SERIES No.28, 2010 at ii

²¹⁰ See ‘Uganda’s Early History’ available at <http://www.infoplease.com/encyclopedia/world/uganda-history.html>, accessed on 10 August 2014. Significantly, company formation in Uganda deteriorated in the period between 1971 and 1979 under the Rule of President Idi Amin Dada who in August 1972 expelled all holders of British passports

periodic eruption of political violence in recent years.²¹¹ In February 2011, Uganda held elections in which President Museveni was elected into power in his fourth consecutive term. In the months following the election, political tensions were exacerbated as Uganda plunged into an economic crisis, recording skyrocketing inflation rates between April and May 2011.²¹² This affected the economy on several fronts and the registration of companies in particular, especially the registration of foreign companies because investors cannot register and operate businesses in hostile political economies.²¹³ Thus, political instability prohibits the establishment and maintenance of companies in Uganda.²¹⁴

High expectations from foreign investors

It takes up to 15 procedures²¹⁵ and 40 business days to establish a foreign-owned company in Uganda. This process equally sets high expectations for foreign investors like the need to deposit a capital investment amount of US\$100 000 with the Bank of Uganda for the intended investment,²¹⁶ submitting a detailed valued investment plan with timings and a comprehensive training program for the local employees before the investment proposal can be considered for issuance with an investment licence, amongst others.²¹⁷ This process also takes a considerable amount of time to be completed before a foreign entrepreneur embarks on the ordinary process of company formation as previously discussed. These requirements limit the number of foreign companies that register in Uganda annually.

and approximately 70,000 Asians of Indian and Pakistani descent. Although a small majority, the British and Asians had played a critical role in Uganda's earliest company formations and their expulsion was detrimental to the process of company formation as well as the economy. Successive governments tried to restore the economy with minimal success until 1986 when the National Resistance Movement (NRM) took over power. The NRM government was established on a manifesto which emphasised the importance of economic development and building a self-sustaining economy and through its Rehabilitation and Development Plan, company formation in Uganda bolstered. See 'The Ten-Point Programme' available at www.austria-uganda.at/dokumente/Ten-Point%20Programme.pdf, accessed on 13/Aug/2014; See B Mahoro & L Matte 'General information: The Ugandan Legal System, Sample Cases, History of Uganda' available at www.mcgeorge.edu/documents/samplecaseshistoryuganda.pdf, accessed on 12 August 2014.

²¹¹ U.S Library of Congress 'Uganda's Historical Background' available at <http://countrystudies.us/uganda/38.htm>, accessed on 12 August 2014.

²¹² Bureau of Economic and Business Affairs '2013 investment Climate Statement – Uganda' op cit note 15.

²¹³ U.S Library of Congress op cit note 211.

²¹⁴ Bureau of Economic and Business Affairs '2013 investment Climate Statement – Uganda' op cit note 15.

²¹⁵ Available at, <http://www.doingbusiness.org/data/exploretopics/starting-a-business>, accessed on 25 August 2014.

²¹⁶ Section 10 (5) Investment Code Act Cap 92.

²¹⁷ Bureau of Economic and Business Affairs '2013 investment Climate Statement – Uganda' op cit note 15.

Furthermore, foreign investors have refrained from registering their companies in Uganda because of the presence of counterfeit goods especially from China and India.²¹⁸ The presence of counterfeit goods results in unfair competition with original goods from other foreign companies. The foreign investor's objective is to protect the reputation of their companies and preserve the quality of their products thus; the presence of counterfeit goods deters future foreign investment in Uganda.

Regulatory inefficiency

The regulatory environment in Uganda is not conducive to entrepreneurial activity. There is no minimum capital requirement for establishing a business, but requirements for commercial licenses are time-consuming and costly.²¹⁹ Further, the formal labor market remains inefficient and lacks dynamism to foster business development. This has curtailed the engagement of entrepreneurs in the process of company formation in Uganda.

High tax burden

Uganda's tax system is comprised of several taxes like Income tax, Value Added Tax, Pay As You Earn, excise duties and, import duty tax.²²⁰ Companies are liable for majority of these taxes on incorporation. Thus, to try and evade payment of numerous taxes, entrepreneurial Ugandans have opted to operate their businesses informally and not engage in the incorporation process. Further, some foreign investors have complained that the tax rules are unclear which has led to tax disputes between the Uganda Revenue Authority (URA) and foreign companies.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

Women and company formation

Women are a powerful work force in Africa.²²¹ Women own 39 percent of the registered businesses in the Uganda Business Register.²²² However, several women still operate their micro-small businesses without the necessary degree of formalization. While the delays and costs of registration and licencing impose a burden on all businesses, evidence from Uganda's Regulatory Best Practice Program suggest that such requirements impose a disproportionate burden on enterprises headed by women.²²³ The regulatory burden is perceived as greater for women in relation to their male counter parts. Women who head enterprises are prone to be subject to harassment, including requests to pay bribes and threats of closure because women are seen as "soft targets".²²⁴ It is also worth noting that by virtue of the distribution of social responsibilities, women are time poor, with greater family responsibility than men and as such are less inclined to formalize their businesses when procedures are complex and time consuming.²²⁵ This has curtailed their engagement in incorporation hence a widespread informal sector in Uganda.

2.8 Impact of an undesirable company formation process on Uganda's economic development

Registered Companies are a major contributor to state's socio-economic development.²²⁶ Although Uganda has been credited as one of Africa's fastest and consistently growing economy; its undesirable process of company formation has encumbered its development and resulted into some of the following;

²²¹ A Ellis, C Manuel & C M Blackden 'Gender and Economic growth in Uganda: Unleashing the Power of Women' available at http://siteresources.worldbank.org/INTAFRREGTOPGENDER/Resources/gender_econ_growth_ug.pdf, accessed on 20 August 2014.

²²² Government of Uganda Report on the Business Register, 2002/2002 Kampala: Uganda Bureau of Statistics

²²³ Ellis et al op cit note 221.

²²⁴ Namatovu & Dawa op cit note 188.

²²⁵ World Bank 'Gender and Economic Growth in Uganda' available at http://siteresources.worldbank.org/INTAFRREGTOGENDER/Resources/gender_econ_growth_ud.pdf, accessed on 8 August 2014.

²²⁶ World Bank 'Economic Overview Uganda' op cit note 14.

Limited growth of the Uganda Stock Exchange (USE); Due to the minimal incorporation of public companies; the Uganda Stock Exchange²²⁷ has a limited number of local companies listed and trading on the market; and its performance has equally attracted very few international companies as well as foreign investors.²²⁸ This places it in an unfavorable position in comparison with similar stock markets like the Johannesburg Stock Exchange. Thus, this minimal growth of the stock exchange market cannot make a major contribution towards Uganda's economic growth.

Unemployment; registered companies avail better conditioned employment opportunities for Uganda's population due to the requirement of compliance with the employment regulations. The failure to register some of these businesses creates unregulated employment conditions with little to no accountability to comply with employment regulations. This has led to unemployment in Uganda especially among the youth who in turn resort to petty crimes to sustain their wellbeing.²²⁹

Poverty; According to the Ugandan budget speech for the financial year 2014/2015²³⁰, the proportion of Ugandans living below the poverty line is 19.7 percent. Further, the United Nations Fund for Population Activities (UNFPA)²³¹ estimated that about 23.1 million of the 34.5 million Ugandans are prone to poverty. If structures like company formation are not improved to encourage the population to engage in business activities in order to improve their economic and social well-being, Uganda will relapse to a state of abject poverty; a condition the current government has fought so hard to get rid of.²³²

²²⁷ Available at <http://www.use.or.ug/>, accessed on 19 August 2014.

²²⁸ Bureau of Economic and Business Affairs '2013 investment Climate Statement – Uganda' op cit note 15.

²²⁹ J A Lule '62% of the youth in Uganda are unemployed' *The New Vision* 1 February 2013.

²³⁰ Available at, <http://www.parliament.go.ug/new/images/stories/speeches/bud14.pdf>, accessed on 20 August 2014.

²³¹ I Anguyo '67% of Ugandans vulnerable to poverty' *The New Vision* 19 March 2013.

²³² U.S Library of Congress op cit note 211.

Inadequate entrepreneurial skills; Entrepreneurial education is often limited to formal establishments. Thus, entrepreneurs that operate unregistered businesses in Uganda have limited access to programs that develop and formalize their entrepreneurial abilities, like the Business to Business (B2B) program which was implemented by the Uganda Investment Authority.²³³ This training enables entrepreneurs to access and utilize appropriate business skills and information which would in turn increase their business efficiency.

High Inflation rate; as of May 2014, the inflation rate in Uganda was at 5.4%.²³⁴ This curtails the performance of the Uganda shilling on international currency markets and equally leads to the increase in the purchase of basic needs and cost of fuel for the local population.²³⁵ Thus, socio-economic development cannot occur in economies where the inflation rate is high.

Loss of government revenue; Registered companies are some of the major contributors of government revenue.²³⁶ This is through the payment of the levied taxes and requisite fees. About 20% of the country's GDP is attained from this sector. However, the informal establishment and running of businesses renders the collection of the much needed government revenue difficult due to the lack of proper documentation indicating the existence and operation of the said businesses which curtails economic development.²³⁷

Limited direct foreign investment; the cumbersome process of company formation in Uganda has led to a decline in the number of foreign companies that are registered in Uganda. This affects government revenue as well as other social benefits that could result from the establishment of

²³³ Uganda Investment Authority 'SME Activities' available at www.ugandainvest.go.ug/index.php/sme-activities, accessed on 20 August 2014.

²³⁴ Republic of Uganda 'Budget Speech FY2014/2015' at 5 available at <http://www.parliament.go.ug/new/images/stories/speeches/bud14.pdf>, P.5 accessed on 20 August 2014.

²³⁵ World Bank 'Economic Overview Uganda' op cit note 14.

²³⁶ Ibid.

²³⁷ Ellis et al op cit note 221.

international companies in Uganda.²³⁸ This limits the diversification of Uganda's economy hence hindering socio-economic development.

Increased Public Debt; Uganda's external and domestic debt is growing by close to two percentage points of the GDP every year totaling to Uganda shillings 14. 5trillion.²³⁹ The near term consequences of the debt expansion presents weaker economic recovery and the private sector will have to absorb the large effect of the increased public debt. Since the majority of entrepreneurs in Uganda do not engage with company formation, the government has insufficient funds at its disposal to cater for the public debt that would have been paid through revenue collections. Thus, if the public debt becomes unsustainable the government will have to undertake severely disruptive fiscal adjustments in order to generate the resources needed to service the debt which may further curtail company formation. The accumulated volumes of debt indicate that the government of Uganda is mortgaging future generations and this is detrimental to economic development.²⁴⁰

Gender inequality; the existing process of company formation in Uganda is said to favour male entrepreneurs at the expense of female entrepreneurs.²⁴¹ This has created entrepreneurial inequality in the society thus disempowered female entrepreneurs from being active in the formal sector which results in informally operated enterprises by women. This curtails economic development especially for this class of individuals in Uganda.

Poor Infrastructure; Uganda is known for its dilapidated road and bridge infrastructure; its railway system is underdeveloped and its airfreight charges are amongst the highest in the

²³⁸ Bureau of Economic and Business Affairs '2013 investment Climate Statement – Uganda' op cit note 15.

²³⁹ S Wasswa 'Outrage as Uganda Public Debt hits Shs 14.5tn' available at <http://chimpreports.com/outrage-as-uganda-public-debt-hits-shs-14-5tn/.html>, accessed on 21 August 2014.

²⁴⁰ Bureau of Economic and Business Affairs '2013 investment Climate Statement – Uganda' op cit note 15.

²⁴¹ Namatovu & Dawa op cit note 188.

African region.²⁴² This leads to higher transportation costs which constrains the growth of the commercial sector as well as economic development.

High tax burden; since very few businesses are registered in Uganda, the Uganda Revenue Authority is forced to levy high taxes on the formal sector to fill the economy's revenue gaps.²⁴³ This leads to the evasion of taxes through improper accounting practices by registered companies as well as the non-registration of enterprises with the URSB, which in turn limit socio-economic development in Uganda.

2.9 Conclusion

In conclusion, despite the coming into force of the new Companies Act with amongst others the objective of simplifying the process of company formation in Uganda; the formation process is still undesirable and in dire need of comprehensive review. Uganda could improve on this status by drawing lessons from developing African countries like South Africa, with a similar company law history which have developed and been commended for having a modified process of company formation.

²⁴² Bureau of Economic and Business Affairs '2013 investment Climate Statement – Uganda' op cit note 15.

²⁴³ World Bank 'Economic Overview Uganda' op cit note 14.

CHAPTER THREE

LESSONS FROM SOUTH AFRICA

INTRODUCTION

This chapter will discuss the process of company formation in South Africa while highlighting the salient features which Uganda could emulate.

3.1 Overview of the process of company formation in South Africa

Before the proposed comprehensive and holistic review of the Companies Act in 2004; company formation in South African was regulated by the Companies Act 61 of 1973 (the 1973 Act) for over thirty years.²⁴⁴ The 1973 Act was based on a framework and general principles of English Law.²⁴⁵ Thus, was not abreast with the fundamental socio-economic developments that had taken place in South Africa since its enactment, like the adoption of a new Constitution in 1996.²⁴⁶ The 1973 Act was highly formalistic which made it cumbersome and costly to form and manage companies.²⁴⁷ It required a long process to form and register companies, including amongst other formalities; the completion of numerous documents, compulsory reservation of a name and the requirement that all members must sign the memorandum and articles of association.²⁴⁸ These requirements resulted in delays during the incorporation process.

On 8 April 2009, the new Companies Act 71 of 2008 (the new Companies Act) was signed into law²⁴⁹, with the intended objective to keep abreast with the current corporate law reforms and to remain relevant in a modern commercial industry.²⁵⁰ However, after the enactment of this legislation, it could not come into force before 8th April 2010 because a waiting period of one

²⁴⁴ South African Company Law for the 21st Century; Guidelines for Corporate Law Reform, Government Gazette No.26493 Notice 1183 of 2004 issued on 24 June 2004 by the Department of Trade and Industry.

²⁴⁵ Ibid at P.11

²⁴⁶ Constitution of the Republic of South Africa NO.108 of 1996

²⁴⁷ South African Company Law for the 21st Century op cit note 244 at 14.

²⁴⁸ Ibid at 15.

²⁴⁹ Government Notice 421, Government Gazette 32121. (South Africa)

²⁵⁰ Ibid.

year had been prescribed.²⁵¹ It only came into effect on 1 May 2011²⁵² and is undoubtedly a concise piece of legislation.²⁵³ The new Companies Act introduces a new, modernized, simplified and flexible method of company formation; doing away with the cumbersome process that encompassed unnecessary hurdles and obstacles under the 1973 Act.²⁵⁴ This simplification perceives incorporation as a right rather than a state privilege.²⁵⁵ The new Companies Act prescribes minimal requirements for the formation of domestic and foreign companies in South Africa.²⁵⁶ The minimum requirements are; the Notice of Incorporation (the NOI), the Memorandum of Incorporation (the MOI) and payment of the prescribed fees facilitated by an electronic process of lodgment.²⁵⁷

Below is a detailed discussion of some of the salient features of the process of company formation in South Africa;

3.2 Salient features of the South African process of company formation which Uganda could emulate

Research in the recent past shows that company formation is good for the economy.²⁵⁸ To keep abreast with this finding, South Africa introduced a new, simpler and less prescriptive process of company formation with the re-enactment and coming into force of the new Companies Act.²⁵⁹ The new process has been deemed to be flexible and more adaptable for both local and foreign investors; and has encouraged entrepreneurship, employment and economic growth. This process of incorporation is administered by the newly formed Companies and Intellectual Property Commission (CIPC), as mandated by the new Companies Act (the ‘Companies Commission’).²⁶⁰ This body is an amalgamation of the Office of Companies and Intellectual Property Enforcement (OCIPE) and the Companies and Intellectual Property Registration Office (CIPRO) of the

²⁵¹ Section 225 Companies Act 71 of 2008; Cassim et al op cit note 89 at 2.

²⁵² GN 550 GG 34239 of 26 April 2011.

²⁵³ Government Notice 550, Government Gazette 34239 of 26 April 2011 (South Africa)

²⁵⁴ Cassim et al op cit note 89 at 8.

²⁵⁵ Section 13 Companies Act 71 of 2008.

²⁵⁶ South African Company Law for the 21st Century op cit note 224.

²⁵⁷ Cassim et al op cit note 89 at 8.

²⁵⁸ Government Notice 1183, Government Gazette 26493 of 23 June 2004- South African Company Law for the 21st Century op cit note 244.

²⁵⁹ The Companies Act 71 of 2008.

²⁶⁰ Chapter 8 Part A read with Schedule 4 Companies Act 71 of 2008.

previous company law regime.²⁶¹ The amalgamation and other developments, as the study will further indicate, were intended to create flexibility and simplicity in the formation and maintenance of companies, and to promote the development of the South African economy.²⁶² Thus, with just a few years in operation, the process has been credited as favorable for South Africa's economy and has several distinctive features which make it suitable to be emulated by other African countries like Uganda. The discussion that follows examines the salient features of company formation in South Africa, which Uganda could emulate;

Types of companies

There two broad types of companies that may be formed in South Africa. That is, profit companies and non-profit companies.²⁶³ This categorization was intended to dispose of the unnecessary complexities relating to the types of companies that could be formed in order to realise the objectives of the new Companies Act under Section 7.²⁶⁴

A profit company is a company formed for the purpose of financial gain for its shareholders.²⁶⁵ In South Africa, a profit company may be a private company, public company, a state-owned company or a personal liability company.²⁶⁶ It may be formed by one or more incorporators or an organ of state regardless of the type of Profit Company it is;²⁶⁷ and it may have any number of shareholders.²⁶⁸ This category of company follows a universal formation mechanism of lodging the NOI and MOI with the Companies Commission.²⁶⁹ Notably, profit companies which bear a greater social and economic responsibility to wider majority of the public may be required to submit additional information to the Companies Commission during

²⁶¹The Companies Act No.61 of 1973.

²⁶² Section 7(b)(ii) Companies Act 71 of 2008.

²⁶³ Section 8(1) Companies Act 71 of 2008.

²⁶⁴ Cassim et al op cit note 89 at 9.

²⁶⁵ Section 1 Companies Act 71 of 2008.

²⁶⁶ Section 8(2) Companies Act 71 of 2008.

²⁶⁷ Section 1 read with Section 13 Companies Act 71 of 2008.

²⁶⁸ Section 39 Companies Act 71 of 2008.

²⁶⁹ Cassim F H I, Cassim M F, Cassim R, Jooste R, Shev J & Yeats J L *Contemporary Company Law* 2ed (2011) Chapter Four, Cassim F C Formation of Companies and the Company Constitution 106-158.

incorporation.²⁷⁰ This additional information relates to extended accountability and transparency requirements and may include the auditing of the financial statements; the appointment of auditors and audit committees; and the obligatory appointment of a company secretary.²⁷¹

In practice as well as theory, profit companies in South Africa are distinguished by the expressions at the end of their company names. That is, a private company must end with the expression 'proprietary limited' or its abbreviation '(Pty)' Ltd;²⁷² a public company must end with the expression 'Limited' or 'Ltd.';²⁷³ a state-owned company must end with the expression 'SOC Ltd.';²⁷⁴ and a personal liability company must end with the expression 'Inc.'.²⁷⁵ In addition, these companies have other specific attributes some of which will be discussed below;

The MOI of a personal liability company must specifically state that it is a personal liability company.²⁷⁶ The effect is that its directors, including the past directors are jointly and severally liable together with the company for any debts and liabilities of the company that had been contracted during their respective periods of office.²⁷⁷ Thus, anyone who conducts business with this type of company is assumed to have knowledge of its personal liability nature by virtue of its name being affixed with the expression 'personal liability' or 'Inc.'.²⁷⁸

There is no limit on the number of shareholders to be held by a private company in South Africa.²⁷⁹ This is in the interest of flexibility and modernization of the process of formation and management of a company; and the realization that the number of shareholders bears no true

²⁷⁰ Memorandum on the Objects of the Companies Bill, Companies Bill [B61D-2008] at para 6; also see Section 84(1); section 30(2) and (7); and section 34(1) and (2) Companies Act 71 of 2008.

²⁷¹ Cassim F H I, Cassim M F, Cassim R, Jooste R, Shev J & Yeats J L *Contemporary Company Law* 2ed (2011) Chapter Four, Cassim F C Formation of Companies and the Company Constitution 106-158.

²⁷² Section 11(3)(c)(ii) Companies Act 71 of 2008.

²⁷³ Section 11 (3)(c)(iii) Companies Act 71 of 2008.

²⁷⁴ Section 11(3)(c)(iv) Companies Act 71 of 2008.

²⁷⁵ Section 11(3)(c)(i) Companies Act 71 of 2008.

²⁷⁶ Cassim et al op cit note 89 at 82.

²⁷⁷ Section 19(3) Companies Act 71 of 2008.

²⁷⁸ Section 19(5) Companies Act 71 of 2008.

²⁷⁹ F H I Cassim 'The Companies Act 2008: An Overview of s Few of its Core Provisions' (2010) 22 *SA Merc LJ* 157 at 162.

correlation on the type of company that the entity is classified as.²⁸⁰ Thus, the unlimited access to the number of shareholders who are members of a private company does not render it a public company.²⁸¹

On the other hand, since public companies raise their capital from the public, the new Companies Act imposes stringent policy safeguards on disclosure and transparency matters to protect the interests of all concerned stakeholders,²⁸² through the disclosure and transparency provisions incorporated throughout the Act.²⁸³ Consequently, it is mandatory for a public company to appoint a company secretary; an audit committee; an independent auditor,²⁸⁴ and to have its annual financial statements audited.²⁸⁵ These appointments ensure enhanced accountability and transparency provisions of the Companies Act. Furthermore, the annual financial statements must be drawn up in accordance with International Financial Recording Standards (IFRS) or in some cases, International Reporting Standards for Small and Medium Enterprises.²⁸⁶ Notably, the annual financial statements must include particulars showing the remuneration and benefits received by each director or prescribed officer.²⁸⁷ Also, the annual return that every company files with the Companies Commission must, in the case of a public company, include a copy of its annual financial statements.²⁸⁸ Listed public and state owned companies are required to appoint a social and ethics committee that monitors the extent to which the companies take stakeholder interests into account.²⁸⁹ Thus, the requirement of the new Companies Act that the board of directors of public companies consist of a minimum of three directors while the mandatory audit committee of a public company must consist of at least one non-executive

²⁸⁰ Cassim et al op cit note 89 at 73.

²⁸¹ Cassim et al op cit note 89 at 73.

²⁸² Chapter 3 of the Companies Act 71 of 2008; for more details also see, Memorandum on the Objects of the Companies Bill, 2008 [B61D-2008] para 6.

²⁸³ For example under sections 23-34; sections 84-94 Companies Act 71 of 2008

²⁸⁴ Section 84(4) Companies Act 71 of 2008. Notably, the appointment of the audit committee is subject to certain exemptions in terms of Section 94(2)

²⁸⁵ Section 30(2)(a) Companies Act 71 of 2008

²⁸⁶ Cassim et al op cit note 89 at 79.

²⁸⁷ Section 30 (4)-(6) Companies Act 71 of 2008

²⁸⁸ Section 33 Companies Act 71 of 2008

²⁸⁹ This may also apply to other Profit Companies depending on their public interest scores; see section 72(4) Companies Act 71 of 2008 read with regulations 26(2) and 43 of the Companies Regulations GNR 351 GG 34239 of 26 April 2011.

director.²⁹⁰ All the above are foreign principles to the Ugandan Companies Act and may be attributed to the minimal incorporation of public companies.

A non-profit company means a company formed for a public benefit, or an object relating to a cultural or social activity for a communal or group interest.²⁹¹ Under the new Companies Act, the income and property of a non-profit company cannot be distributed to its members or directors.²⁹² This type of company is distinguished by the expression ‘NPC’ affixed at the end of the name of the entity.²⁹³ A non-profit company must be formed by at least three persons acting in common as incorporators.²⁹⁴ An organ of state or juristic person may also incorporate a non-profit company.²⁹⁵ An important innovation of the new Companies Act is that a non-profit company may be formed without members.²⁹⁶ The term members under the new Companies Act²⁹⁷ is used to refer to persons who hold membership and have specific rights in respect of a non-profit company and are not the incorporators of the non-profit company.²⁹⁸

The MOI of a non-profit company must set out at least one object of the company.²⁹⁹ The object must be either; a public benefit object or an object relating to one or more cultural or social activities, communal or group interests.³⁰⁰ In addition, the MOI must be consistent with all the other requirements of item 1 of Schedule 1 of the new Companies Act, which deal with the objects and policies of non-profit companies, particularly the application of their assets, income, the distribution of their residual assets on dissolution and the voting rights of voting members. This means that the activities of the non-profit company are restricted by the objects under its

²⁹⁰ Section 94 Companies Act 71 of 2008; requires an audit committee to comprise at least three members, each of whom is a director of the company who is not involved in the day-to-day management of the company’s business. The regulations require a social and ethics committee to comprise at least three directors or prescribed officers or at least one of whom must be non-executive director-Regulation 43; For further details see Cassim et al op cit note 89 at 79.

²⁹¹ Cassim et al op cit note 89 at 81.

²⁹² Section 1 read with Schedule 1, Item 1 (3) Companies Act 71 of 2008.

²⁹³ Section 11(3)(v) Companies Act 71 of 2008

²⁹⁴ Section 1 and 13(1) Companies Act 71 of 2008

²⁹⁵ Cassim et al op cit note 89 at 88.

²⁹⁶ Schedule 1 Item 4(1) and 4(2)(d) Companies Act 71 of 2008

²⁹⁷ Section 1 Companies Act 71 of 2008

²⁹⁸ Cassim et al op cit note 89 at 88.

²⁹⁹ Ibid at 89-91

³⁰⁰ Item 1(1)(a) of Schedule 1 Companies Act 71 of 2008

MOI.³⁰¹ Thus, it is crucial that all the assets and income of a non-profit company be applied to advance its stated objects under the MOI.³⁰² However, it is permissible for a non-profit company to acquire and hold securities that are issued by a profit company or carry on any business, trade or any undertaking; directly or indirectly, either alone or with other persons, provided that this is consistent with or ‘ancillary’ to its stated objects.³⁰³ Furthermore, it is crucial that a non-profit company does not pay or distribute any portion of its income or transfer any of its assets whether directly or indirectly, to an incorporator, member or any person appointed as director of the company, unless the distribution or payment is reasonable remuneration for goods delivered to the company or for services rendered to the company; or as reasonable payment or reimbursement for expenses incurred in advancing a stated object of the company.³⁰⁴

The concept of non-profit companies does not exist and is not regulated within the ambit of Uganda’s new Company’s Act. If a similar approach like South Africa is emulated by Uganda as discussed above, the registration and administration of non-profit organizations in Uganda would be simplified by virtue of being brought under a single regulating structure. Additionally, there would be a consolidation of legislation governing the incorporation companies rendering the process of company formation flexible and more adaptable.

Registration of foreign companies

Foreign companies under the purview of the new Companies Act in South Africa are referred to as external companies.³⁰⁵ They may either be ‘external profit companies’ or ‘external non-profit companies’.³⁰⁶ Section 1 of the new Companies Act defines an external company, as a company that conducts its business or non-profit activities, subject to section 23(3). This means that the new Companies Act only applies to external companies and not to other foreign companies.³⁰⁷ Thus, a foreign company can only be registered by the Companies Commission if it is deemed to

³⁰¹ Cassim et al op cit note 89 at 89-91.

³⁰² Item 1(2)(a) of Schedule 1 Companies Act 71 of 2008

³⁰³ Item 1 (2)(b) of Schedule 1 companies Act 71 of 2008. Also see Cassim et al op cit note 89 at 90.

³⁰⁴ Item 1(3) of Schedule 1 Companies Act 71 of 2008

³⁰⁵ Cassim et al op cit note 89 at 94-98

³⁰⁶ Section 23(1) Companies Act 71 of 2008

³⁰⁷ Section 23 Companies Act 71 of 2008

be “carrying on business” or non-profit activities within South Africa.³⁰⁸ It achieves this status under two circumstances. First, if the foreign company is a party to one or more employment contracts within South Africa; then it must be registered as an external company. Secondly, when a foreign company engages in a course of conduct, or has engaged in a course or pattern of conduct or activities within South Africa over a period of at least six months and a reasonable person would conclude that the company has the intention to engage in business or non-profit activities within South Africa on an ongoing basis; such entity should be registered as an external company.³⁰⁹ However, foreign companies engaged in activities stipulated under Section 23(2), like holding shareholders meetings in South Africa do not require registration as external companies, because the stipulated activities do not amount to ‘carrying on business’. The new Companies Act further provides that a foreign company must register with the Companies Commission as an external company within 20 business days after its initial conduct of business or non-profit activity in South Africa.³¹⁰ However, if a foreign company fails to register as an external company within three months after commencing business activities in South Africa, it may be issued with the compliance notice requiring it to register as prescribed under section 23(1) of the new Companies Act as previously discussed and within 20 business days after receiving the notice, or otherwise cease carrying on business in South Africa.³¹¹ Furthermore, according to section 23(3), an external company must maintain and register at least one office with a name and an address of a contact person based in South Africa with the Companies Commission;³¹² and updated details of the external company’s registration details must be included in its annual return.³¹³ Notably, the company legislation of the external company’s country of origin must be similar to that of South African to facilitate its registration as an external company in South Africa and once an external company has been fully registered and assigned a registration number, it is referred to as a ‘registered external company’.³¹⁴ External company formation in South Africa follows the universal company formation mechanism as

³⁰⁸ Cassim et al op cit note 89 at 94.

³⁰⁹ Ibid at 95.

³¹⁰ Section 23 (1) (a) and (b) Companies Act 71 of 2008

³¹¹ Section 23(6) Companies Act 71 of 2008

³¹² Read with Regulation 20. This application is made on prescribed Form CoR 20.1.

³¹³ Section 33(2) Companies Act 71 of 2008

³¹⁴ Section 1 Companies Act 71 of 2008

described above accompanied with the relevant documents of incorporation from the company's initial country of formation.³¹⁵

Additionally, the new Companies Act creates a new sub-species of foreign company referred to as 'domesticated company'.³¹⁶ A domesticated company is a foreign company whose registration has been transferred to South Africa.³¹⁷ Once its registration has been transferred, the company exists as a company in terms of the new Companies Act, as if it had been originally incorporated and registered in South Africa.³¹⁸ The application for the transfer of registration must be made in the prescribed manner and form stipulated under section 13(6) and Form CoR 17.1 of the new Companies Act, and must be accompanied by the prescribed application fee, and requisite documents, including a copy of the company's most recent annual financial statements from its country of origin to be registered in South Africa.³¹⁹ However, under Section 13 (7) of the new Companies Act; a foreign company is inter alia prohibited from transferring its registration if it's in liquidation. Thus, when the foreign company complies with all the requirements of domestication and registration as stipulated above,³²⁰ the commissioner issues a registration certificate to the effect that such registration has taken place and that the company is deemed to have been incorporated under the new Companies Act and is a South African company. However, it's important to note that the registration of a domesticated company does not establish a new company.³²¹ Both its identity and its continuity as juristic person remain unaffected and neither are the rights of any other person. Thus, any legal proceedings, instituted by or against the juristic person, remain effective.³²²

³¹⁵ Cassim et al op cit note 89 at 106-158.

³¹⁶ Ibid at 10.

³¹⁷ Section 1 read with Section 13(5)-(11) Companies Act 71 of 2008.

³¹⁸ Section 13(5) Companies Act 71 of 2008.

³¹⁹ Cassim et al op cit note 89 at 99.

³²⁰ Section 13(3) (4) and Section 14 Companies Act 71 of 2008.

³²¹ Cassim et al op cit note 89 at 100.

³²² Section 13(11) Companies Act 71 of 2008.

Company name

Often the first stage in company formation is the selection of a suitable company name.³²³ In selecting a suitable company name, the incorporators must bear in mind the criteria for the company names laid down by the new Companies Act.³²⁴ The principal legal objective of this criterion of company names is to protect the goodwill associated with company names and to prevent public deception by the use of names that are misleading and imply a non-existent association.³²⁵ In so doing, the intention of the legislature under the new Companies Act is to give effect, within limits, to the constitutional right of freedom of expression.³²⁶ Unlike the previous system under the 1973 Act, it is no longer mandatory to first make an application to approve and reserve the company name prior to initiating the process of company formation.³²⁷ A proposed name of the company may now be submitted in the NOI, which is filed with the Companies commission.³²⁸ Name reservation does, however, remain available under the new Companies Act as an optional voluntary facility, in acknowledgment of its useful purpose.³²⁹ Thus, name reservation may serve a useful purpose in certain circumstances. For instance, when the incorporators have an interest in a particular company name but are not yet ready to engage with the formalities for incorporating and registering the company. The Companies Commission will reserve the name for an applicant provided that the name requested for reservation has not already been reserved nor has it been registered by another company.³³⁰ The reservation of a company name endures for a period of six months from the date of application.³³¹ However, the Companies Commission may extend the six month reservation period for a period of 60 days at a time, when good cause has been proven.³³² The new Companies Act also permits reserved company names to be transferred for use by another incorporator on demand.³³³ However, no person may attempt to abuse the name reservation system for the purpose of trading in company

³²³ Cassim et al op cit note 89 at 113.

³²⁴ Section 11 Companies Act 71 of 2008.

³²⁵ Cassim et al op cit note 89 at 113.

³²⁶ Memorandum on the objects of the Companies Bill, 2008, Companies Bill [B61D-2008] at para 5.

³²⁷ Section 42(1) Companies Act 61 of 1973

³²⁸ Cassim et al op cit note 89 at 113.

³²⁹ Section 12(1) Companies Act 71 of 2008.

³³⁰ Section 12(2) Companies Act 71 of 2008.

³³¹ Cassim et al op cit note 89 at 120.

³³² Section 12(4) Companies Act 71 of 2008; this requires an application by the person for whom the name is registered, accompanied by the prescribed fee.

³³³ Section 12(5) and Regulation 11 Companies Act 71 of 2008; This application is done on Form CoR11.1.

names.³³⁴ The new Companies Act gives the Companies Commission the power to issue a notice to a person suspected of attempting to abuse the name reservation system, requiring that person to show cause' why the name should be transferred or reserved for it.³³⁵ Alternatively, the Companies Commission may simply refuse to grant the transfer or extension of the name reservation, and may even cancel the name reservation.³³⁶ It must be emphasized from the outset that a proposed company name that is unsuitable, inappropriate or incomplete does not delay the process of incorporation and registration of a company in South Africa.³³⁷ This is a laudable change in approach as it ensures that the commencement of a business with an unsuitable company name is not hindered.³³⁸ Furthermore, where the name of a company, as reflected on the NOI does not clearly state the appropriate company indicator for example 'Ltd.', or 'Inc.', the Companies Commission itself may insert the requisite expression when processing the registration of the given company.³³⁹ In the event that the proposed name is the same as that of another company, the Companies Commission will nonetheless register the company by using an interim name instead of the proposed company name.³⁴⁰ The interim name consists merely of the companies registration number followed by the appropriate expression affixed at the end of the registration number indicating the type of company it is.³⁴¹ Once the company has been registered with an interim name, the Companies Commission invites the company to file an amended NOI with a suitable company name.³⁴² Thereafter, the Companies Commission enters the amended name into the company's registry and issues an amended registration certificate reflecting the amended name.³⁴³ When an incorporator fails to comply with stipulated procedure, a compliance notice may be issued by the Companies Commission.³⁴⁴

On the other hand, when the Companies Commission in processing the registration of a company discovers that the proposed name of the company is 'confusingly similar' to another registered

³³⁴ Cassim et al op cit note 89 at 120.

³³⁵ Ibid.

³³⁶ Section 12(6) Companies Act 71 of 2008.

³³⁷ South African Company Law for the 21st Century op cit note 244.

³³⁸ Cassim et al op cit note 89 at 116.

³³⁹ Section 14(2)(a) Companies Act 71 of 2008.

³⁴⁰ Section 14(2)(b)(i) Companies Act 71 of 2008.

³⁴¹ Section 14(2)(b)(i) Companies Act 71 of 2008.

³⁴² Section 14(2)(b)(ii) Companies Act 71 of 2008.

³⁴³ Section 14(2)(b) Companies Act 71 of 2008.

³⁴⁴ Failure to comply with such a notice would have far reaching consequences-Section 171 Companies Act 71 of 2008.

name.³⁴⁵ It may by way of written notice order the applicant to serve a copy of the application of the given company on the party with the registered similar name, informing them of the applicant's interest in the use of the company name.³⁴⁶ A person to whom the notice is delivered, or any other person with an interest in the name, may then approve the use of the name or apply to the companies tribunal to protect his or her interest in the particular name.³⁴⁷

Uganda engages a laborious process of name reservation as discussed in chapter two which could be eased by emulating the process of company name used in South Africa as elaborated above.

Documents of incorporation

The process of company formation in South Africa only engages two documents. That is, the Notice of Incorporation and the Memorandum of Incorporation. The MOI developed from the merger of the memorandum and articles of association under the 1973 Act.

The NOI is a document filed by the incorporators to the Companies Commission containing inter alia, the name of the company, the details of the directors of the company; informing them of the incorporation of a company for the purpose of having it registered.³⁴⁸ The purpose of this document is to inform the Companies Commission of the intention to register a particular company.³⁴⁹ The NOI must be filed together with a copy of the MOI as well as the payment of the prescribed fee in order to authenticate the process of company formation in South Africa.³⁵⁰

The Memorandum of Incorporation is the most important document of company formation in South Africa.³⁵¹ It is the sole governing document of the company and it is a new development of the new Companies Act in order to align with modern trends of best

³⁴⁵ Section 11(3)(a) Companies Act 71 of 2008.

³⁴⁶ Section 14(3)(a) read with section 11(2)(b) Companies Act 71 of 2008.

³⁴⁷ Section 14(3)(a) and Section 160(1) Companies Act 71 of 2008. This must be done on Form CTR 142; Regulation 3.

³⁴⁸ Section 1 read with Section 13(1) (b) Companies Act 71 of 2008.

³⁴⁹ Cassim et al op cit note 89 at 108.

³⁵⁰ Section 13(2)(a) Companies Act 71 of 2008

³⁵¹ Cassim et al op cit note 89 at 122.

international practice by merging the MOA and the AOA from the old companies Act.³⁵² It is the founding document of the company that sets out the rights, duties, and responsibilities of shareholders, directors and others within and in relation to the company.³⁵³ Furthermore, the MOI, deals with matters such as the powers of the company; the amendment of the MOI; the ability to create rules of the company; securities of the company and debt instruments; shareholders, shareholder meetings and procedures; the composition of the board of directors; the authority and powers of the directors; compensation and indemnification of directors; and in case of non-profit companies the disposal of the company's assets upon dissolution of the company, amongst others.³⁵⁴ These factors will, vary depending on the type of company and the envisaged needs and structure of the company.³⁵⁵ The new Companies Act introduces a novel and an important approach to the contents of the MOI by providing for 'unalterable' and 'alterable' provisions.³⁵⁶ In this regard, it imposes certain core requirements that must form part of the MOI of every company. The purpose of these requirements is to create a standardized document that protects the interests of shareholders, as well as creditors and other stakeholders that deal with the company.³⁵⁷

An 'unalterable provision' of the MOI means a provision of the new Companies Act that does not expressly contemplate that its effect on any particular company may be altered, whether by a company's MOI or its rules.³⁵⁸ Accordingly, every MOI may impose a more onerous requirement but not a less onerous requirement, on the company. In this regard, section 15(2)(a)(iii) of the new Companies Act provides that a company may include in its MOI inter alia any provisions imposing on the company a higher standard, or greater restriction when carrying on business and a company is prevented from 'contracting out' of these mandatory provisions of the new Companies Act.³⁵⁹ Further, the new Companies Act stipulates that each provision of a company's MOI must be consistent with the Act.³⁶⁰ However, it is notable that in certain circumstances, and in the interest of flexibility; a person may apply to the Companies

³⁵² Ibid.

³⁵³ Ibid.

³⁵⁴ Ibid at 125.

³⁵⁵ Ibid at 123.

³⁵⁶ Ibid at 125.

³⁵⁷ Ibid at 123.

³⁵⁸ Section 1 Companies Act 71 of 2008.

³⁵⁹ Memorandum on the objects of the Companies Bill, 2008, Companies Bill [B61D-2008] para 5.

³⁶⁰ Section 15(1) Companies Act 71 of 2008; see further Cassim et al op cit note 89 at 126.

Tribunal to exempt a company's MOI from an unalterable provision of the new Companies Act. The Companies Tribunal may grant an administrative order of exemption, if it is satisfied that the relevant provision in the company's MOI serves a reasonable purpose other than to defeat the effect of the unalterable provision in question, and that it is reasonable and justifiable to grant the exemption.³⁶¹

Apart from the unalterable provisions, there are certain 'default rules' that a company may choose to accept or alter in its MOI.³⁶² These are termed as 'alterable provisions'. They allow for flexibility in respect of the contents of the MOI.³⁶³ An 'alterable provision' means a provision of the new Companies Act in which it is expressly contemplated that its effect on a particular company may be altered by that company's MOI, whether by negation, restriction, limitation, qualification, extension or other alteration in substance or effect.³⁶⁴ If a company wishes to alter an 'alterable provision', this must be done in the stipulated terms of the MOI, failing of which the alteration will be ineffective.³⁶⁵ Most of the alterable provisions of the new Companies Act are 'opt-out' provisions, i.e. they will apply to the company unless it opts out of them by explicitly stipulating so in its MOI.³⁶⁶ This may be contrasted with the 'opt-in' provisions, which do not apply to a company unless it specifically provides for this, in its MOI.³⁶⁷ Thus, the alterable provisions of the new Companies Act enable a company to tailor the contents of the company constitution to suit its business needs.³⁶⁸

Apart from the unalterable provisions and the alterable provisions of the MOI; a company may include any other provision dealing with a matter that the Act is silent on or a matter that is not addressed in its MOI.³⁶⁹ The company's MOI may also contain restrictions and prohibitions on the amendment of its provisions,³⁷⁰ which further add to the flexibility of the contents of the MOI.³⁷¹

³⁶¹ Section 6(2)(3) Companies Act 71 of 2008; Cassim et al op cit note 89 at 127.

³⁶² Section 15(2)(a)(ii) Companies Act 71 of 2008.

³⁶³ Cassim et al op cit note 89 at 126.

³⁶⁴ Section 1 Companies Act 71 of 2008.

³⁶⁵ Section 19(1)(c)(ii) read with Section 15(2)(a)(ii) Companies Act 71 of 2008.

³⁶⁶ Cassim et al op cit note 89 at 126.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

³⁶⁹ Section 15(2)(a)(i) Companies Act 71 of 2008

³⁷⁰ Section 15(2)(b) and (c) Companies Act 71 of 2008

³⁷¹ Cassim et al op cit note 89 at 127.

The MOI of a company may either be in a form that is unique to the company or the prescribed form under the new Companies Act.³⁷² The prescribed form constitutes the simplest possible format of incorporation. In this case, the incorporators simply adopt the mandatory provisions of the new Companies Act and accept the default provisions with or without alterations.³⁷³

In respect to listed companies, section 15(1) is subject to section 6(15), which provides that to the extent that the listing requirements of an exchange require a specific content or a particular effect of a company's MOI that alters the substance or effect of an unalterable provision of the Act, that provision of the company's MOI will nevertheless prevail and will not be void. It is worth noting in this regard that certain requirements for the MOI of a listed company and its major subsidiaries are prescribed by the JSE listing requirements.³⁷⁴ Thus, the rationale is for the company to comply with the stipulated provisions of the JSE listing requirements.

Uganda on the other hand, engages two documents during incorporation as previously discussed above and this has prevented many from formal business establishments in that economy.

Electronic filing

Formation of a company in South Africa is facilitated by a system of electronic lodging of documents and electronic filing.³⁷⁵ This mode of registration can be accessed from the Companies Commission website which is, www.cipc.co.za, and this has made the process of company formation simpler, flexible and less cumbersome. Currently, electronic filing of documents may only be done to register private companies but developments are under way to enable all other types of registrations.

On the other hand, the digitized company registration system of Uganda is defunct which results in delays associated with company formation in the country due to the use of a manual registration system. Manual registration renders the formation process inadequate. A Simulation of the electronic system of company registration in South Africa will improve the status of company formation in Uganda thus, the level of formal establishments in Uganda.

³⁷² Section 15 Companies Act 71 of 2008.

³⁷³ Regulation 15 and Forms CoR 15.A, 15.1B, 15.1C, 15.1D, and 15.1E Companies Act 71 of 2008

³⁷⁴ Schedule 10 Companies Act 71 of 2008

³⁷⁵ Cassim et al op cit note 89 at 9.

Time

It takes between five to seven business days³⁷⁶ to complete the process of company formation in South Africa for both domestic and foreign companies while it takes between thirty two to forty business days to complete the same process in Uganda. The South African time frame is facilitated by a propitious regulatory and administrative structure prescribed by the new Companies Act. This has encouraged entrepreneurs especially those operating SME's to register their businesses in South Africa. To illustrate, in 2012 there was an increase of about 20% on SME registration with the Companies Commission in South Africa since the establishment of the new process of company formation in 2011.³⁷⁷ Further, it is suffice to note that entrepreneurs from the SME sector are often reluctant to devote a lot of time to formal company formation processes. Thus, this accessible means to register a company encourages an increase in the registration of businesses in this sector which in turn is beneficial for the development of the economy. Consequently, the aforementioned factor could be the main obstacle of company formation and it could be of benefit for the URSB to employ a mechanism that operates with in a similar time frame regarding the process of company formation in Uganda.

Business Commencement

Business commencement in South Africa may be denoted by the possession of a registration certificate.³⁷⁸ A registration certificate is issued by the Companies Commission as evidence of incorporation and registration of the company.³⁷⁹ It serves as conclusive evidence that all the requirements for incorporation have been complied with. Once it has been issued, the company is deemed as incorporated and comes into existence as a separate juristic person with effect from the date and time, if any, stated on the registration certificate.³⁸⁰ In this regard the Companies Commission dates the registration certificate either as at the date and time it issued the certificate, or as at the specific date, if any, requested by the incorporators in terms of the NOI,

³⁷⁶ World Bank Group 'Ease of Doing Business in South Africa' available at <http://www.doingbusiness.org/data/exploreeconomies/south-africa/>, accessed on 28 August 2014.

³⁷⁷ NCR 'Literature Review on Small and Medium Enterprises' Access To Credit and Support In South Africa' available at http://www.ncr.org.za/pdfs/Literature%20Review%20on%20SME%20Access%20to%20Credit%20in%20South%20Africa_Final%20Report_NCR_Dec%202011.pdf at 9, accessed on 1 September 2014.

³⁷⁸ Section 1 Companies Act 71 of 2008

³⁷⁹ Section 1 and Regulation 14 Companies Act 71 of 2008

³⁸⁰ Section 14(4) and Section 19(1)(a) Companies Act 71 of 2008

whichever of these two dates happens to be the later one.³⁸¹ Consequent to the policy of simplification and the decreased regulatory oversight of company formation, the requirement of a certificate to commence business has been abolished.³⁸² A company may now generally commence business once it is registered.³⁸³ On the other hand, business commencement after company registration in Uganda requires a trading licence in addition to a certificate of incorporation. Hence, the numerous regulatory requirements for company formation make the process of company formation in South Africa more suitable for Uganda to emulate in order to modify its process of company formation; as opposed to the current position contained in its recently enacted Companies Act. Thus, it could be of benefit for Uganda to use South Africa as a benchmark to comprehensively review its process of company formation in order to realize sustainable development by 2040.

3.3 Advantages of a modified process of formation of a company to South Africa

Below are some of the benefits associated with a modified process of company formation in South Africa.

Enhanced development of the stock market; Stock markets thrive on the formation of public companies in an economy, a characteristic which can be attributed to the performance of Johannesburg Stock Exchange (JSE). Its bolstered performance is inter alia facilitated by an increased presence of public companies resulting from the modified process of formation, as well as the unique status conferred upon foreign companies on registration in South Africa, as previously discussed. The activities of the JSE have inter alia enhanced foreign investment in South Africa by encouraging foreign entrepreneurs to invest in quality listed African companies. This in turn enhances socio-economic development in the country. To illustrate, the Johannesburg Stock Exchange is currently ranked 19th largest stock exchange in the world and the largest on the African continent with over 400 listed companies.³⁸⁴

³⁸¹ Section 14(1)(b)(iii) Companies Act 71 of 2008

³⁸² Cassim et al op cit note 89 at 109.

³⁸³ Ibid.

³⁸⁴ <https://www.jse.co.za/about/history-company-overview> accessed on 2 September 2014

The modification of the process of company formation in South Africa has seen the growth of small and medium size enterprises (SME's) and it has led to an increase in the incorporation and registration of SME's. This formalization of business has enabled SME's to access capital towards enhancing their business objectives, from financial institutions that often prefer to extend credit facilities to registered businesses. This in turn has encouraged entrepreneurship at a grass roots level in South Africa hence, bolstered socio-economic development. To illustrate, these structures have been estimated to make-up 91% of South African formalized businesses; providing employment for 60% of the labour market; and with a total economic output amounting roughly to 34% of the GDP. Therefore, this indicates that this sector alone facilitates inclusive development in South Africa.³⁸⁵

Increase in government revenue; in 2013, the National Treasury registered an increase in Company Income Tax (CIT) as compared to the preceding years.³⁸⁶ This increase was inter alia attributed to the increased rate of company registrations for both local and foreign entities in South Africa, which has been fostered by the modified process of company formation. This has enhanced economic development in South Africa as a result of the availability of resources to facilitate such development.

Employment Rights; Employment legislation in South Africa apply to domestic companies as well as foreign companies. However, if a foreign company is engaged in one or more employment contacts within South Africa, it must be registered as an external company. As such, the employment regulations in South Africa apply to it without exceptions.³⁸⁷ This provides protection for the employees that deal with these companies and ensures that they obtain the full benefits of employment. This further caters to the labour market in South Africa by providing stable employment and contributes to economic development.

³⁸⁵ The Banking Association South Africa 'Small & Medium Enterprise' <http://www.banking.org.za/index.php/our-industry/small-medium-enterprise/>, accessed on 2 September 2014.

³⁸⁶ '2013 Tax Statistics'

'<http://www.treasury.gov.za/publications/tax%20statistics/2013/TStats%202013%20WEB.pdf> at 7, accessed on 2 September 2014.

³⁸⁷ Cassim et al op cit note 89 at 95.

Competitiveness of the South African economy; South Africa was ranked the 53rd most competitive economy out of 148 surveyed in 2013/2014 World Economic Forum's Global Competitiveness Index, making it the second highest ranked African economy after Mauritius.³⁸⁸ The Competitiveness Index is based on inter alia structural reforms that identify and strengthen the transformative forces that drive future economic growth. The comprehensive review of the new Companies Act that resulted into a simpler and flexible process of company formation is one of such structural reforms that have improved the competitive status of the South African economy, hence, attributed to this ranking. Thus, a good corporate law system lies at the very foundation of a prosperous competitive economy.³⁸⁹

3.4 Conclusion

The World Bank Doing Business project ranked South Africa at 7 and Uganda at 32 out of 47 Sub-Saharan economies with an eased process of starting a local business.³⁹⁰ This speaks to the stark disparities in the process of company formation between the two countries. South Africa has a simpler and less cumbersome process than that of Uganda. The above discussion speaks to the peculiar features of company formation in South Africa. Thus, it could be of benefit for Uganda to draw lessons from South Africa on how to improve on its process of formation of a company.

³⁸⁸Global Competitiveness Index 2014, available at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf accessed on 2 September 2014.

³⁸⁹ Ibid.

³⁹⁰ <http://www.doingbusiness.org/rankings> accessed on 2 September 2014

CHAPTER FOUR

THE WAY FORWARD

4.1 Summary

This chapter will discuss the way forward for company formation in Uganda, in light of the views discussed above. Chapter two and three illustrate the comprehensible disparities between the company formation in Uganda and South Africa while illustrating that the process of formation of a company in Uganda leaves much room for development. Thus, if the process of company formation in Uganda is not brought at the forefront of comprehensive review, its future economic development aspirations will be stifled, because company formation lies at the foundation of commercial activity which inter alia fosters economic development.³⁹¹ Furthermore, an underdeveloped commercial sector with an undesirable process of company formation does not assist in the realization of Uganda's 'vision 2040'³⁹²; in which it aspires to transform the economy from a low-income economy to a competitive middle-income economy by 2040.

Since it no longer needs to be emphasized that a good corporate law lies at the foundation of a prosperous economy;³⁹³ the process of company formation in South Africa could be used as a benchmark to enhance the process of company formation in Uganda. South Africa has a similar company law history as Uganda but has managed to comprehensively review its process in order to align with best international practice.³⁹⁴ The development in the corporate law has bolstered its commercial sector and enhanced its economic development. Thus, the discussion below provides recommendations on how Uganda can improve on its process of company formation drawing lessons and approaches from South Africa in order to attain similar or even better trends of economic development.

³⁹¹ Cassim et al op cit note 89 at 3.

³⁹² Further details on "vision 2040" available at <http://www.finance.go.ug/>, accessed on 25 August 2014.

³⁹³ Cassim et al op cit note 89 at 3.

³⁹⁴ South African Company Law for the 21st Century op cit note 244.

4.2 Recommendations

The government of Uganda will need to review its theoretical and practical perceptions on the process of company formation in order to benefit from its commercial sector. Consequently, the government will have to revise its cumbersome and rigid positions under the new Act and move towards appreciating the role of company formation as a tool of socio-economic development.³⁹⁵ This may be achieved by an overhaul of the recently amended Companies Act 1 of 2012 in order to come up with a law that will ensure that the company legislation is abreast with Uganda's commercial and social needs; especially regarding the process of company formation-which needs to be made simpler, flexible and more adaptable for both local and foreign entrepreneurs. The comprehensive review should result in a law as well as a process suitable for Uganda's economic, social, political and cultural needs. That is, a law tailored and made specifically for the Ugandan economy. This should result in a malleable process of company formation especially on a domestic level which in turn will encourage the formal establishment of companies in Uganda. Specifically, the legislature may need to review inter alia; the definition of the term company, the documents of the process of company formation; the procedures associated with the company name; and the types of companies which may be formed, amongst other factors in Uganda. These elements are elaborated in detail below.

The GOU may need to revise the definition of the term 'company' under section 1 of its new Act. This may be done by the adoption of the phrase 'juristic person', as used under section 1 of the South African Companies Act under the definition of the term 'company'. This term merges all the phrases used in the definition of the term company under the Ugandan Companies Act, as previously discussed.³⁹⁶ This phraseology eliminates the use of long statements to define the term company and enables both domestic and foreign companies to form part of the definition of the term company which makes it more comprehensible for the users of the legislation as well as other concerned stakeholders.

The legislature may need to do away with the complexities related to the types of companies that may be formed under the Act.³⁹⁷ This may be done by adopting a two-broad

³⁹⁵ Ibid.

³⁹⁶ Definition of Company, Section 1 Companies Act 1 of 2012.

³⁹⁷ Section 4 Companies 1 of 2012.

based type categorization similar to that under the South African Companies Act.³⁹⁸ This will ease the process of company formation in Uganda for incorporators, by categorizing their incorporations under one of two types of companies; a position which has been attributed to the simplification of the process of company formation in South Africa as discussed under chapter three. A broad classification of companies to be formed often confuses entrepreneurs. This deters them from engaging with the process of formation and registration of companies.

Uganda's Companies Act needs to do away with the possibility of formation of companies limited by guarantee.³⁹⁹ Modern company law has resigned this type of company to history, thus, inapplicable. Furthermore, domestic entrepreneurs in Uganda longer form this type of company, hence a redundant section of the Companies Act.

There is a common belief in Uganda that the majority of international companies from all over the world initiate investments in Africa by registering their companies in Johannesburg. This speaks to the enabling regulatory environment of the process of registration of foreign Companies in South Africa. Thus, it could be of beneficial for Uganda to adopt a similar approach of foreign company registration.⁴⁰⁰ These peculiar policies relate to the registration of foreign companies as either 'external companies' or 'domesticated companies'.⁴⁰¹ This will encourage foreign investment in Uganda as is the case of South Africa; as well as boost direct foreign revenue collections from registered foreign companies. Furthermore, the Uganda Investment Authority should review and ensure the flexibility of some of the requirements that are currently in place for the registration of foreign companies, like the investment licence and the minimum capital requirements.⁴⁰² This will encourage the registration of foreign companies in Uganda as well as foster socio-economic development. To illustrate, the UIA may decrease the minimum capital requirement to fifty thousand United States dollars instead of the one hundred United States dollars required as the capital investment deposit.⁴⁰³

³⁹⁸ Section 8(1) Companies Act 71 of 2008.

³⁹⁹ Section 4 (2)(b) Companies Act 1 of 2012.

⁴⁰⁰ See discussion in Chapter three.

⁴⁰¹ See Cassim et al op cit note 89 at 94-100.

⁴⁰² See discussion in Chapter Two.

⁴⁰³ Section 10(5)(b) Investment Code Act Cap 92-requires a foreign investor intending to register a company in Uganda to deposit a sum of one hundred thousand United states dollars or its equivalent in Uganda shillings.

There is a need for the GOU to abandon the ‘two-document constitution’ required for the process of formation of a company.⁴⁰⁴ Currently, the two-document constitution and its original rationale have long been abandoned best international practice of company law.⁴⁰⁵ Originally, the underlying principle was that the MOA should contain provisions that were sacrosanct, inflexible and unalterable by the company, while the provisions of the AOA were subject to alteration by special resolution.⁴⁰⁶ However, with the gradual erosion of this principle, it made little sense to sustain a two-document constitution.⁴⁰⁷ A single company constitution may be adopted that merges the two documents.⁴⁰⁸ Thus, Uganda could benefit from adopting a similar approach and abandoning the memorandum and articles of association which curtail the incorporation process by being involving it with numerous documents.

The mandatory process of name reservation in Uganda ought to be abolished and replaced with voluntary name reservation as done in South Africa.⁴⁰⁹ Name reservation in Uganda involves a lot of time which delays the registration of process.⁴¹⁰ Thus, the suitability of the company name ought to be established during the actual process of company formation which in turn minimizes the time spent on the process company formation. Furthermore, company formation in Uganda should not be denied or delayed on grounds of unsuitability of the company name.⁴¹¹ Rather, an interim name, as elaborated in chapter three, may be adopted to facilitate the registration process as well as give time to the incorporators to select another suitable name.⁴¹² Additionally, a digitalized name search system needs to be established and made accessible to both local and foreign incorporators to further curtail delays in verifying a chosen company name. This will help inform the incorporators of the suitability of the selected company names even before they engage in the process of company formation in Uganda. Further, if a similar name as contained in the company’s registry is presented to the Registrar of companies for incorporation; he or she should call for a notice to be served on the other party who registered the name earlier, informing them of the intention of the incorporators to register a

⁴⁰⁴ The two document constitution means the Memorandum and Articles of Association.

⁴⁰⁵ See Cassim et al op cit note 89 at 9.

⁴⁰⁶ P L Davies *Gower and Davies: The Principles of Modern Company Law* 7ed (2003) 57.

⁴⁰⁷ Cassim et al op cit note 89 at 123.

⁴⁰⁸ Refer to discussion in Chapter Three on a single document of incorporation.

⁴⁰⁹ Section 36 Companies Act 1 of 2012 read with Section 11 Companies Act 71 of 2008.

⁴¹⁰ See discussion in Chapter Two.

⁴¹¹ Busiki & Co. Advocates op cit note 22.

⁴¹² Section 14(2)(b) Companies Act 71 of 2008

similar name.⁴¹³ If the initial incorporators reasonably object to the use of the particular name, registration of the company using the similar name should not ensue to avoid future problems of trading with a similar name. To illustrate, the availability of the aforementioned principle could have done away with the current controversies between “Balton Uganda Limited” and “Bolton Uganda Limited”, over the trade confusions associated with carrying on business with a similar company name.⁴¹⁴

The GOU needs to review the requirement of the acquisition of a trading licence in order to commence business after the registration of the company with the Uganda Registration Services Bureau.⁴¹⁵ The trading licence adds to the numerous statutory requirements of company formation in Uganda.⁴¹⁶ This makes the process of company formation burdensome and discourages domestic entrepreneurs, especially, operating small and medium enterprises from engaging with the process in Uganda. Since the issue of the Certificate of Incorporation serves as evidence that all the requirements for incorporation have been complied with, it should also be used as a certificate to commence business in Uganda.⁴¹⁷

Uganda’s Companies Act needs to incorporate provisions that provide for the translation of the requisite documents of company formation to the numerous local dialects frequently used in commercial activity in Uganda.⁴¹⁸ This will ensure that the documents are comprehensible to entrepreneurs who have to complete the company formation documents. This adoption has encouraged company formation on a grassroots level in South Africa hence, the increased number of SME registrations as previously discussed. However, such translations must be accompanied by a sworn statement of the person who made the translation, stating that it is a

⁴¹³ Refer to Section 14(3)(a) read with section 11(2)(b) Companies Act 71 of 2008

⁴¹⁴ Further details available at,

http://www.judicature.go.ug/data/news/34/Balton_Uganda_Limited_Sues_Bolton_International_Limited.html, accessed on 29 August 2014.

⁴¹⁵ Healy Consultants op cit note 16.

⁴¹⁶ See discussion in Chapter Two.

⁴¹⁷ Section 22 (1) Companies Act 1 of 2012.

⁴¹⁸ The principle of translations was adopted by South Africa and is used for its documents of incorporation. For details on subject see Section 17(3) read with Regulation 15(5) Companies Act 71 of 2008. As well as Cassim et al op cit note 89.

true, accurate and complete translation of the original document of incorporation.⁴¹⁹ In the event of conflict, a filed translation of the incorporation documents will prevail.⁴²⁰

Other than the recommendations directed towards the comprehensive review of the company legislation, the government of Uganda needs to address other factors as discussed in chapter two which curtail the company formation. The discussion below provides recommendations on how these problems could be addressed.

The GOU should establish an operational digitized mechanism of company formation in order to move away from the manual process of company formation which is associated with numerous problems. This could be done by adopting a similar mechanism like South Africa.⁴²¹ This will minimize the delays engaged of company formation in Uganda as well as smooth the operations and administration of the process by the Uganda Registration Services Bureau.

The URSB will need to establish offices' all over the country offering the service of company formation as opposed to the centralized office suited in Kampala. This will make this service readily available and accessible to all entrepreneurs in the country which will in turn encourage and escalate company formation in Uganda. Furthermore, this will reduce the volume registrations managed by one office and minimize the loss of registration files.

The URSB will need to review on the time taken to complete the process of company formation in Uganda. Uganda should emulate South Africa's time frame where the process of company formation takes between five to seven business days to be completed.⁴²² The time problem could also be addressed by reducing the number of stages involved with the process of company formation.

⁴¹⁹ Section 17 (4) Companies Act 71 of 2008.

⁴²⁰ Section 18(1) (a) Companies Act 71 of 2008.

⁴²¹ Online company registration in South Africa available at www.cipc.co.za.

⁴²² The World Bank '*Doing Business Report 2014*' op cit note 31.

The GOU needs to improve access to information on the process of company formation, especially for rural and foreign entrepreneurs, in order to encourage this class to engage with the process in Uganda. This could be done through literacy projects by URSB, UIA and the Private Sector Foundation of Uganda (PSFU). Notably, access to information is an important aspect of company formation because it equips entrepreneurs with knowledge on how to register and operate their businesses formally.

Furthermore, financial institutions should also engage in literacy projects which educate local entrepreneurs on how and when they can easily access credit facilities to grow their business. This will enlighten local entrepreneurs on the importance of company formation in conjunction with the access of credit facilities from financial institutions which will in turn encourage them to engage with the process thus boosting economic development in Uganda. To illustrate, research has shown that the primary purpose of corporations is not regulatory but enabling acts to authorize businessmen to organize and operate their businesses, large or small, with the advantages of corporate mechanism.⁴²³

It could also be of benefit for the GOU to consolidate its company laws especially relating to the process of company formation in order to move away from the multiplicity of legislation relating to the process as discussed in chapter two. This multiplicity of legislation complicates the process thus rendering it problematic and unadoptable which results in the high rate of informal businesses. An all-inclusive legislation on company formation in Uganda will simplify the registration and administration of companies in Uganda. However, it is unavoidable that such an approach would cause some conflict between the legislation to be merged unless the consolidation is done properly and carefully to create a law that is consistent.⁴²⁴ The task of restating, consolidating and harmonizing legislation is not an easy one; it requires care and

⁴²³ H W Ballantine *Ballantine on Corporations* (1946) 42.

⁴²⁴ See South African Company Law for the 21st Century op cit note 244.

diligence as was done in South Africa.⁴²⁵ Thus, if the above recommendation is to be adopted, extreme care and diligence should be adopted.

The Presidential Investors Roundtable (PIRT) introduced in 2004 by President Museveni as a forum to solicit input from national and international investors on ways to accelerate reform and increase private investment and competitiveness in Uganda should discuss problems associated with company formation as a priority, in order to find solutions to for this area since company formation lies at the core of investment of any economy.⁴²⁶

The GOU needs to revisit the regulatory mechanisms relating to the formation of public companies to address issues why public companies are not formed in Uganda. It may do so by adopting the current position in South Africa to foster the formation of public companies.⁴²⁷ This will inter alia lead to the development of the Uganda Stock Exchange (USE) which would consequently foster socio-economic developments, as previously discussed.

The current process of company formation in Uganda has been accused of being burdensome for women as compared to men as discussed in chapter two. Thus, the GOU needs to revisit the provisions of the Companies Act relating to company formation to ensure that they are universally adoptable and are inclusive to all entrepreneurs in Uganda. This will ensure the engagement of women in the process of incorporation because research suggests that Ugandan women are highly entrepreneurial; contribute significant amounts of labour although much of it is unpaid and are extremely creditworthy operating informal enterprises all over the country.⁴²⁸

The PSFU should establish a working group on women's entrepreneurship whose advocacy should focus on pushing for gender sensitive legal and regulatory reforms in order to encourage

⁴²⁵ See Cassim FHI 'The Companies Act, 2008: An Overview of a Few of its Core Provisions' (2010) 22 SA *Merc LJ* 157.

⁴²⁶ Bureau of Economic and Business Affairs '2013 investment Climate Statement – Uganda' op cit note 15.

⁴²⁷ See discussion in Chapter three.

⁴²⁸ Ellis et al op cit note 221.

women to engage in formal business in Uganda. Additionally, these policies will encourage women to participate in the entrepreneurial phenomenon and then their contribution to economic growth and development; their innovation and societal value to communities will be realized.⁴²⁹

The GOU needs to review the costs of business registration and approvals as some of these charges are unaffordable especially by small and medium entrepreneurs.⁴³⁰ Additionally, the exorbitant charges levied by legal practitioners to offer assistance in the company formation should be addressed.⁴³¹ A standardization of costs involved in the process of company formation should be established and made applicable to all concerned stakeholders. This will encourage company formation in Uganda. Furthermore, the costly virtual monopoly of lawyers in assisting with the process of company formation should be addressed because this is one of the main reasons given by the majority of entrepreneurs especially from rural areas in Uganda are not engaging with the process.⁴³²

The URA will need to streamline the aspect of tax administration and customs because local and foreign entrepreneurs have often complained of facing enormous difficulties with taxes and customs.⁴³³ Thus, the URA needs to develop policies to assist entrepreneurs especially during incorporation through tax clinics and open discussions. For example, the URA could introduce a policy for the combination of the business registration and tax payer identification numbers; which are issued to formal business owners separately and often cause confusion when it comes to the payment of their taxes.

⁴²⁹ Ibid.

⁴³⁰ A break down of the fees payable may be accessed from the Uganda Registration Services Bureau, available at, http://www.ursb.go.ug/index.php?option=com_content&view=article&id=31&Itemid=119, accessed on 25 Aug 2014.

⁴³¹ Healy Consultants op cit note 16.

⁴³² Business Licencing Reform Committee op cit note 127.

⁴³³ Bureau of Economic and Business Affairs '2013 investment Climate Statement – Uganda' op cit note 15.

If the above recommendations are to be adopted for the Uganda's Companies Act 1 of 2012, a waiting period should be prescribed to give corporate lawyers, directors, accountants, auditors, and company secretary's time to understand and apply the new changes in the law. In addition to this waiting period, a transitional period should be conferred on all pre-existing companies, providing them with an opportunity to harmonise their documents with the new recommendations of the Companies Act.⁴³⁴ This will enable the developments in the Companies Act to be adopted without hostility and also facilitate effective operation of the recommended additions to the company legislation. Therefore, the intention of these recommendations is not to jettison the body of jurisprudence developed over the centuries, but to propose areas for reform which will result in a simpler and flexible process of company formation as well as a clear, certain and accessible corporate law system suitable for Uganda's development needs.

4.3 Conclusion

The fact that companies are not being formally registered in Uganda may not be attributable to the company legislation alone but to a whole host of factors as discussed in this study. It follows that making incorporation easier is not a panacea for this problem. However, the Government of Uganda must heed the need for review of the company legislation in order to cater to some of the conceptual complexities involved with the process of company formation. The comprehensive review may be done by making reference and emulating the approach adopted by other developing African countries like South Africa with a similar British derivative company law history. Notably, South Africa was the first sub-Saharan country to take progressive steps in adopting and providing legal means and expectations of a typical modern process of formation of a company. Thus, South Africa's process aligns with best international practice and has been commended as suitable for South Africa's economic, social, political and cultural needs which has bolstered its economic development. From a legislative stand point, if Uganda adopts a similar approach of company formation as South Africa, its future development aspirations will be attainable therefore minimising the development gap between the two sub-Saharan African countries. This adoption could also improve Uganda's economic rankings in the world as this

⁴³⁴ A similar approach was adopted by South Africa. See Farouk H I Cassim 'Introduction to the new Companies Act: General Overview of the Act' Chapter One in Cassim F H I, Cassim M F, Cassim R, Jooste R, Shev J & Yeats J L *Contemporary Company Law* 2ed (2011)

could assist in the better performance of the economy.⁴³⁵ However, the process of comprehensive legislative reform should preserve and enhance the rules and concepts of company law, especially in the area of company formation, which have been effective for Uganda over the centuries.

Distinctly, amending the Ugandan legislation especially on the process of company formation to correlate with the South African Companies Act 71 of 2008 in the ways discussed is not possible without causing substantive knock-on effects in the rest of the statute. As was the case in South Africa, this approach would require prolonged and comprehensive drafting efforts and amendments to the various parts and principles of the Ugandan statute in order to refrain from a ‘cut and paste’ adoption of the principles of the South African companies Act. This will escalate company formation in the country as well as foster socio-economic development because company formation lies at the foundations of economic development.

⁴³⁵ For example rankings of the Global Competitiveness Index, available at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf accessed on 2 September 2014

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